NO. 82-6614

IN THE

SUPREME COURT OF THE UNITED STATES

, 198

KEITH ZETTLEMOYER,
Petitioner

-against-

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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Keith Zettlemoyer petitions this Honorable Court for a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania in this case.

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are:

1. WHETHER PETITIONER'S RIGHT TO DUE PROCESS OF LAW WAS VIOLATED WHERE THE PROSECUTION FAILED TO ESTABLISH THE LEGAL ELEMENTS OF THE AGGRAVATING CIRCUMSTANCE UPON WHICH THE IMPOSITION OF THE DEATH PENALTY WAS PREDICATED?

2. WHETHER THE PENNSYLVANIA SUPREME COURT, IN INTERPRETING THE AGGRAVATING CIRCUMSTANCE, SO BROADENED ITS AMBIT BEYOND THE CLEAR STATUTORY LANGUAGE AS TO DEPRIVE PETITIONER OF HIS RIGHT TO DUE PROCESS OF LAW?

3. WHETHER PENNSYLVANIA'S DEATH PENALTY PROVISION VIOLATES DUE PROCESS OF LAW FOR ITS FAILURE TO REQUIRE THAT THE SENTENCING AUTHORITY BE PERSUADED BEYOND A REASONABLE DOUBT BEFORE IMPOSING THE DEATH PENALTY THAT TOTAL AGGRAVATION OUTWEIGHS TOTAL MITIGATION?

4. WHETHER PETITIONER'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS WERE VIOLATED WHERE THE TRIAL COURT GAVE A MISLEADING AND INCOMPLETE CHARGE TO THE JURY CONCERNING THE REQUISITE BURDEN OF PROOF TO BE APPLIED IN THE WEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES?

5. WHETHER PETITIONER'S RIGHTS TO DUE PROCESS OF LAW AND TO EQUAL PROTECTION UNDER LAW WERE VIOLATED WHERE THE PENNSYLVANIA SUPREME COURT FAILED TO ENGAGE IN ADEQUATE AND MEANINGFUL REVIEW OF THE APPROPRIATENESS OF THE DEATH PENALTY IN THIS CASE AS COMPARED TO OTHER CAPITAL CASES?

PARTIES TO THE PROCEEDING

The parties before the Supreme Court of Pennsylvania were the District Attorney of Dauphin County and the Attorney General of the Commonwealth of Pennsylvania for the Commonwealth of Pennsylvania. Appellant was Keith Zettlemoyer.

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The opinion of the Supreme Court of Pennsylvania, reported at ___ Pa. ___, 454 A.2d 937 (1982), including dissents of Samuel J. Roberts, J. (now Chief Justice) (in which Henry X. O'Brien, C.J. joined) and Robert N. C. Nix, Jr., J., is attached as Appendix, Part 1.

The Pennsylvania Supreme Court affirmed an opinion of the Court of Common Pleas of Dauphin County, reported at 103 Dauph. 93 (1981), Appendix, Part 2.

JURISDICTION

The judgment and opinion of the Supreme Court of Pennsylvania was entered December 30, 1982. On February 7, 1983, a timely Application for Reargument filed by appellant on January 13, 1983, was denied, per curiam. On February 25, 1983, the Supreme Court of Pennsylvania granted a stay of proceedings pending review by This Honorable Court.

This Court has jurisdiction to review the judgment below by writ of certiorari pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Eighth Amendments and the relevant portion of the Fourteenth Amendment to the United States Constitution are set forth in the Appendix as Part 3A. Relevant portions of the Pennsylvania Sentencing Code, 42 Pa.C.S.A. §9711 et seq. are set forth in the Appendix as Part 3B.

STATEMENT OF THE CASE

Petitioner, Keith Zettlemoyer, was charged with the October 13, 1980 killing of Charles Devetsco in Harrisburg (Dauphin County), Pennsylvania. At the conclusion of a week-long trial by jury, petitioner was found guilty of first degree murder. Following a sentencing hearing the same jury imposed the death penalty. Post-trial motions were timely filed, argued and later denied by the Dauphin County Court of Common Pleas by an opinion dated October 16, 1981. [See Appendix, Part 2] Appeal to the Pennsylvania Supreme Court was taken October 30, 1981, supported by a brief and supplemental brief raising eighteen separate issues. Oral argument was held on October 25, 1982 in Philadelphia and on December 30, 1982, a majority of the Pennsylvania Supreme Court affirmed the conviction and sentence of death. Commonwealth v. Zettlemoyer, ___ Pa. ___, 454 A.2d 937 (1982).[1] [See Appendix, Part 1] An application for reargument was filed and denied by the same court on February 7, 1983. Petitioner's appeal was the first case in which the Pennsylvania Supreme Court reviewed the death penalty procedure found in the Pennsylvania Sentencing Code, 42 Pa.C.S.A. §9711 et seq. [See Appendix, Part 3B]

At the sentence hearing the Commonwealth sought to prove only one aggravating circumstance. The applicable subsection reads:

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[1]The Pennsylvania Supreme Court split, four to three, in its decision on petitioner's appeal.

> The victim was a prosecution witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceeding involving such offense.

42 Pa.C.S. §9711(d)(5). However, in an attempt to prove this circumstance, the district attorney offered evidence showing merely that the deceased was mentioned as a potential witness during voir dire proceedings in a neighboring county (Snyder County) and that felony indictments had been lodged against petitioner in Snyder County [N.T. Sentencing 4-10].[2] No evidence was put forward to indicate the nature of the testimony that might have been given by the deceased. More important, the Commonwealth failed to introduce evidence to prove the elements of the aggravating circumstance concerning the motive for the killing, that petitioner "committed" the underlying felories, or that the deceased was a "witness to" the underlying felony.

At the conclusion of the Commonwealth's case (sentencing hearing), defense counsel approached the bench and demurred, asserting that the evidence was not sufficient to prove beyond a reasonable doubt [42 Pa.C.S.A. §9711(c)(1)(iii)] the aggravating circumstance. This motion was denied by the trial

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[2]Although the record is not entirely clear, defense counsel and the district attorney stipulated that relevant testimony from the trial stage would be incorporated into the sentencing hearing. No other testimony concerning the applicable aggravating circumstance was offered by the prosecution.

court. [N.T. Sentencing 11] The same issue was argued in petitioner's brief, and orally, before the Pennsylvania Supreme Court which affirmed the ruling of the trial court. Commonwealth v. Zettlemoyer, ___ Pa. ___, 454 A.2d 937 (1982) at 951-952. A dissenting opinion, written by Justice (now Chief Justice) Roberts and joined by Chief Justice O'Brien noted this deficiency in the evidence, finding that the Commonwealth "... failed to meet its burden of proving the presence of an aggravating circumstance," requiring that "the jury's sentence must be set aside, and a life sentence imposed." Id., at 969-971.

The burden of proof to be applied at the sentencing hearing is expressly set forth in the Pennsylvania Sentencing Code:

> (1) Before the jury retires to consider the sentencing verdict, the court shall instruct the jury on the following matters:
>
> * * * * * * * * * * *
>
> (iv) The verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.

42 Pa.C.S.A. §9711(c)(1)(iv). [Emphasis added.]

Following the taking of testimony at the sentencing hearing, the trial judge incorrectly instructed the jury as to the burden of proof on two occasions. The court's charge, in part, was as follows:[3]

> The Court: ... If you do not, on the other hand, if you find that the mitigating circumstances outweigh the aggravating circumstances, or that there is no aggravating circumstances, then you must return a verdict of life imprisonment.

[N.T. Sentencing 33] [Emphasis added.]

* * * * * * * * * * *

> ... If, on the other hand, you find that the Commonwealth has not proven an aggravating circumstance beyond a reasonable doubt or if they have, that the mitigating circumstances outweigh the aggravating circumstances, then you must bring in a verdict of life imprisonment.

[N.T. Sentencing 36] [Emphasis added.]

In taking exception to this charge defense counsel explicitly notified the trial court that the instructions were erroneous as to the appropriate burden of proof. At side bar, counsel stated:

> You are creating a different burden. You are saying the mitigating has to outweigh the aggravating. To my

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[3]The charge of the court is attached as Appendix, Part 4.

> thinking, if it was fifty-fifty, they have to come back with life. The law says the aggravating has to outweigh the mitigating. It never says the mitigating has to outweigh the aggravating.

[N.T. Sentencing 38]. The trial judge then gave further instruction to the jury which clearly did not either withdraw or correct the previous improper statements concerning burden of proof. [N.T. Sentencing 39-40] Moreover, in failing to instruct the jury that "the verdict must be a sentence of life imprisonment in all other cases," the charge was incomplete and misleading. Defense counsel, still not satisfied, again requested a side bar conference and offered:

> I am requesting that they specifically be told that the mitigating does not have to outweigh the aggravating....

[N.T. Sentencing 40].

> The Court: You have an exception.

[N.T. Sentencing 40].

Petitioner raised this issue in his post-trial motions to the lower court and again on appeal to the Pennsylvania Supreme Court. A related issue, the statute's failure to specify a standard of proof in the weighing process,[4] was raised by

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[4]Petitioner introduced evidence of five (5) mitigating circumstances: (1) The defendant has no significant history of prior criminal convictions; (2) the defendant was under the influence of extreme mental or emotional disturbance; (3) the capacity of the defendant to appreciate the criminality of his

petitioner before the Pennsylvania Supreme Court. He argued that the standard must be "beyond a reasonable doubt." Both of petitioner's arguments were rejected in the majority opinion. Id., at 953-954, 963-964. A dissenting opinion by Justice Nix would, however, vacate the sentence

> "... because (1) the statutory standard determining the sentence to be imposed has as yet to be clearly defined and (2) the instructions given by the trial court on this subject were ambiguous and confusing."

Id., at 971-972.

Finally, petitioner, in his appeal to the Supreme Court of Pennsylvania challenged the lack of specific provisions in the Pennsylvania Sentencing Code to provide a mechanism for the implementation of meaningful appellate review. This argument was rejected by the majority of the Pennsylvania Supreme Court which acknowledged that meaningful appellate review is necessary yet proceeded to perform a perfunctory review in which petitioner's appeal was compared to only one other case. Id., at 960-962.

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conduct or to conform his conduct to the requirements of law was substantially impaired; (4) the age of the defendant at the time of the crime; (5) any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense. 42 Pa.C.S.A. §9711(e)(1)(2)(3)(4) and (8). Witnesses called by petitioner, both at the trial and sentencing stage, to support a finding of the above mitigating circumstances included the arraigning district justice and his secretary [N.T. Trial 566-589], who observed petitioner's glazed eyes and in what appeared to be a drugged condition; personnel from the Dauphin County Prison [N.T. Trial 589-602] who felt petitioner was either drugged or a suicide threat and therefore placed him in isolation; mental health caseworkers and a prison psychologist [N.T. Trial 608-647] who observed and interviewed petitioner, noticed similar

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. PETITIONER'S RIGHT TO DUE PROCESS OF LAW WAS VIOLATED WHERE THE PROSECUTION FAILED TO ESTABLISH THE LEGAL ELEMENTS OF THE AGGRAVATING CIRCUMSTANCE UPON WHICH THE IMPOSITION OF THE DEATH PENALTY WAS PREDICATED.

At the sentencing proceeding, the Commonwealth sought imposition of the death penalty based upon the following aggravating circumstance:

> (d) Aggravating circumstances.--Aggravating circumstances shall be limited to the following:
>
> * * * * * * * * * * *
>
> (5) The victim was a prosecution witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceeding involving such offenses.

42 Pa.C.S.A. §9711(d)(5). The Pennsylvania Sentencing Code provides that all aggravating circumstances must be proved beyond a reasonable doubt. 42 Pa.C.S.A. §9711(c)(1)(iii)

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symptoms and reported that he was confused and psychologically unstable, a clinical psychologist (Dr. Stanley Schneider) [N.T. Trial 690-747] who diagnosed petitioner as a schizoid personality with paranoid features; and members of petitioner's family who reported petitioner's bizarre and reclusive behavior prior to the killing and later at the Dauphin County Prison [N.T. Trial 651-690]. [N.T. Sentencing 13-19]

The only evidence offered by the Commonwealth to prove the above-noted circumstance was that petitioner was present at a voir dire proceeding in Snyder County during which the deceased's name was mentioned as a potential witness in a pending felony proceeding against petitioner and the reading of the felony indictments lodged against petitioner in Snyder County. At no time did the Commonwealth provide any information to the sentencing authority concerning the nature of the testimony that might have been given by the deceased; nor did the Commonwealth provide any nexus between the deceased's possible testimony and the crimes charged in the Snyder County indictments. This void in the evidence was noted by Justice (now Chief Justice) Roberts in his dissent wherein he stated:

> "On this record it is clear that there is insufficient evidence to establish all necessary elements of this statutorily-defined aggravating circumstance. The Commonwealth's evidence showed only that the victim's name had been read from a list of Commonwealth witnesses at the jury-selection stage of the trial of appellant on felony charges. The Commonwealth presented no evidence as to the nature of the victim's proposed testimony at the felony trial from which the jury could conclude that the victim was "a prosecution witness to a murder or other felony committed by the defendant...."

[Dissenting Opinion of Justice (now Chief Justice) Roberts, ___ Pa. ___, 454 A.2d 937 at 969].

In particular, by virtue of the aforementioned deficiencies in proof, the Commonwealth failed to establish that "the victim was a prosecution witness to a murder or other felony" and

further failed to establish the scienter element of the circumstance. This first deficiency is only tangentially addressed by the majority in distinguishing between "to" and "in."[5] While, in conclusory fashion, it finds that the scienter element was proved beyond a reasonable doubt, the majority utterly fails to identify any evidence supporting that conclusion. The record at most proves: (a) that petitioner was charged with a felony; (b) that he had knowledge the deceased could be a witness; and (c) that petitioner killed the deceased. Thus, a finding that motive was proved in petitioner's case would require a presumption that in any case where a witness is killed by a defendant and the defendant has knowledge that he will be a witness, there is per se proof of motive. Such a presumption, however, is wholly without support in the express language of the statute.[6] Since the circumstance requires proof that the victim "was killed for the purpose of preventing his testimony against the defendant," the Commonwealth was obligated to offer some evidence of motive (a verbal threat, a note, an admission) to satisfy its burden.[7] Instead, the majority effectively shifts the burden to petitioner to prove the existence of some motive other than that specified

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[5]See discussion, infra, p. 13-16.

[6]The legislature could easily have drafted a statute requiring only knowledge or notice. For example, it could have written, "... was known to be a witness and was killed...."

[7]For example, in People v. Bratton, 54 Cal. App.3d 536, 126 Cal. Rptr. 740 (1976), the prosecutor produced evidence of notes written by the defendant to the victim ordering her not to give information to the police.

in the aggravating circumstance. Id. In so doing, the majority flagrantly disregards the holding of this Honorable Court in In re Winship, 397 U.S. 358, 90 Sup.Ct. 1068, 25 L.Ed.2d 368 (1970).[8]

Petitioner respectfully submits that the imposition of the death penalty, given the above-described failure of proof, violates his right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the U. S. Constitution.

2. THE PENNSYLVANIA SUPREME COURT, IN INTERPRETING THE AGGRAVATING CIRCUMSTANCE, SO BROADENED ITS AMBIT BEYOND THE CLEAR STATUTORY LANGUAGE AS TO DEPRIVE PETITIONER HIS RIGHT TO DUE PROCESS OF LAW.

The aggravating circumstance under which the death penalty was imposed in the case at bar provides:

> The victim was a prosecution witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceeding involving such offenses.

[Emphasis added.] 42 Pa.C.S.A. §9711(d)(5).

The Pennsylvania Supreme Court, in interpreting the statute, broadens its application by reading "witness to" to mean

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[8]Petitioner further submits that the Commonwealth failed to prove that the Snyder County felony was "committed by the defendant" and failed to prove that the deceased was "a prosecution witness to [as opposed to in] a murder or other felony." This failure of proof will be addressed in Reason 2, infra.

"witness in." Further, it entirely reads out of the statute any requirement of proof that the defendant committed the underlying offense. Petitioner, on the other hand, contends that the "witness to" language contemplates that the victim was an eyewitness to the commission of the "murder or other felony" and that the "committed by" language requires proof that the defendant, in fact, committed the underlying crime.

While the dictionary provides many definitions of the word "to," the only applicable meaning in the context of the statute is: "opposite, at, next to, etc.,; used to indicate nearness or contact...." Webster's New Twentieth Century Dictionary, Unabridged (2d edition, 1976); Funk & Wagnall's Standard College Dictionary (1977). Thus, according to the common and approved usage of the English language, the phrase "witness to a murder or other felony" means that the witness was a person present at the scene.

This Honorable Court has clearly held that the unique nature of a death penalty provision demands strict construction more than any other penal statute. See Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). Accordingly, the Pennsylvania Supreme Court was not free to expand the common and approved usage of the words of the aggravating circumstance. This Honorable Court has also held, in Bouie v. City of Columbia, that:

> ... A deprivation of the right of fair warning can result not only from vague statutory language but also from unforseeable and retroactive judicial expansion of narrow and precise statutory language...." 378 U.S. 347 at 352, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964).

In effectively rewriting the statute, the Pennsylvania Supreme Court usurps the function of the legislature. Such usurpation is particularly improper in a death penalty case. See Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (plurality opinion).

The only applicable definition of the word "commit" in the context of the statute is: "to do; to effect or perpetrate: as to commit murder." Webster's New Twentieth Century Dictionary, Unabridged (2d edition, 1976). As previously mentioned, the sole evidence offered by the Commonwealth to prove that petitioner committed the underlying felony was the existence of the criminal indictments against him in Snyder County.[9]

Notwithstanding the foregoing dictionary definition, the majority finds that the "committed by" element was satisfied. The sole basis for the majority's finding is the purported difficulty of proving that a defendant committed the underlying felony. Clearly, such reasoning is incorrect and cannot be reconciled with the beyond a reasonable doubt standard.

The majority does not say what the term "committed by" means. However, by finding that the Commonwealth's evidence on this element is sufficient, and since the only evidence presented

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[9]The majority, in its apparent zeal to sustain the imposition of the death penalty, improperly seizes upon extraneous comments made by defense counsel at side bar. Commonwealth v. Zettlemoyer, ___ Pa. ___, 454 A.2d 937 at 952 (1982). These comments were never heard by the jury and therefore were not part of the evidence it considered.

by the Commonwealth was that petitioner had been indicted, it follows that the majority holds that "committed by" means nothing more than "charged with." Such holding totally disregards the common and approved usage of the English language. Moreover, it contravenes the well-established principle of American jurisprudence that being charged with a crime is fundamentally different from having committed it.

3. PENNSYLVANIA'S DEATH PENALTY PROVISION VIOLATES DUE PROCESS OF LAW FOR ITS FAILURE TO REQUIRE THAT THE SENTENCING AUTHORITY BE PERSUADED BEYOND A REASONABLE DOUBT, BEFORE IMPOSING THE DEATH PENALTY, THAT TOTAL AGGRAVATION OUTWEIGHS TOTAL MITIGATION.

The Pennsylvania death penalty provision mandates the imposition of the death penalty where there is at least one aggravating and no mitigating circumstance, or if one or more aggravating circumstances outweigh any mitigating circumstances.[10] 42 Pa.C.S.A. §9711(c)(1)(iv). The statute, however, does not specify what standard of proof is to be applied by the factfinder in the weighing process. Accordingly, as suggested by Justice Nix in his dissenting opinion in the instant case, the jury's

> decision of life or death [could have turned] on the weight of a feather.

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[10] Instantly, in arriving at the sentence of death, the jury had to engage in a weighing process in that one mitigating circumstance was stipulated to (lack of a significant history of prior convictions) and evidence of four other mitigating circumstances was presented by the defense.

___ Pa. ___, 454 A.2d 937 at 972 (1982). Such a lax standard of proof, particularly in the context of a death penalty decision, clearly violates petitioner's right to due process of law.

In In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), this Honorable Court held that the Fifth and Fourteenth Amendments protect the "accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. 358 at 364. This standard applies whenever a party is subject to any criminal sanction no matter how slight. A fortiori, it should apply when a party is subject to the ultimate criminal sanction, the death penalty. See Gardner v. Florida, 430 U.S. 349 at 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).

In Pennsylvania, as in other states, aggravating circumstances are wholly a creation of the legislature. However, in Pennsylvania, no discretion is reposed in the jury to assess the substantiality of such circumstances in warranting the death penalty in a given case. Rather, once the jury finds the existence of an aggravating circumstance, the judgment of the legislature mandates the imposition of the death penalty unless the weighing process is resolved in favor of the accused. The need, therefore, for a strict standard of proof is compelling to insure the reliability and appropriateness of the sentence. Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). Ledewitz, "The Requirement of Death: Mandatory Language in the Death Penalty Statute," DUQUESNE LAW REVIEW, Vol. 21, No. 1 (Fall, 1982): 103-157[11]

[11] See and compare, State v. Wood, 648 P.2d 71 (Utah, 1982) wherein the Utah Supreme Court, in addressing the same issue, decided that the appropriate standard to be followed by the sentencing authority in weighing aggravating against mitigating circumstances in a capital case is the beyond a reasonable doubt standard.

4. PETITIONER'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS WERE VIOLATED WHERE THE TRIAL COURT GAVE A MISLEADING AND INCOMPLETE CHARGE TO THE JURY CONCERNING THE REQUISITE BURDEN OF PROOF TO BE APPLIED IN THE WEIGHING OF THE AGGRAVATING AND MITIGATING CIRCUMSTANCES.

The Pennsylvania Sentencing Code provides:

> (iv) the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.

42 Pa.C.S.A. §9711(c)(1)(iv). [Emphasis added.]

As is apparent upon an examination of the foregoing provision, only upon a jury finding that aggravating circumstances outweigh all mitigating ones can a defendant who has established at least one mitigating circumstance be condemned to death.[12] Instead of tracking the statutory language in its charge, the trial court instructed the jury:

> The Court: ... If you do not, on the other hand, if you find that the mitigating circumstances outweigh the aggravating circumstances, or that there is no aggravating circumstance, then you must return a verdict of life imprisonment.

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[12] One mitigating circumstance was the subject of a stipulation in the instant case (lack of a significant history of prior convictions) and the judge so charged. [N.T. Sentencing, p. 39]

[N.T. Sentencing, p. 33] [Emphasis added.]

> ... If you find that aggravating circumstance and find no mitigating or if you find that the aggravating circumstance which I mentioned to you outweighs any mitigating circumstance you find, your verdict must be the death penalty. If, on the other hand, you find that the Commonwealth has not proven any aggravating circumstance beyond a reasonable doubt or if they have, that the mitigating circumstances outweigh the aggravating circumstances, then you must bring in a verdict of life imprisonment.

[N.T. Sentencing, p. 36] [Emphasis added.] When measured against the statutory language, it becomes clear that the trial court's charge was "misleading, ambiguous, confusing and incomplete." (dissenting opinion of Justice Nix, ___ Pa. ___, 454 A.2d 937 at 971-972).

The erroneous nature of the instructions was timely brought to the attention of the trial court by defense counsel. Specifically, counsel asserted that the court misled the jury by indicating, on two occasions, that a life sentence could be imposed only if mitigating circumstances outweighed aggravating ones. [N.T. Sentencing, p. 38] Further, defense counsel requested that, consonant with the statute, the jury be instructed that "mitigating does not have to outweigh aggravating." [N.T. Sentencing, p. 40] In an attempt to cure this error, the trial court merely reiterated part of the previously given charge and failed to withdraw or correct the misleading instructions as to burden of proof. [N.T. Sentencing, pp. 39-40][13] As observed by

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[13]Subsequent efforts by defense counsel to correct these errors were perfunctorily refused. [N.T. Sentencing, p. 40]

Justice Nix in his dissenting opinion:

> ... This later statement, characterized in the majority opinion ... as curative, is neither corrective nor curative of the earlier erroneous charge. No mention was made of the fact that the mitigating circumstances need not outweigh the aggravating circumstances. In fact a request for such instructions were [sic] refused.

___ Pa. ___, 454 A.2d 937 at 972.

Even the majority was constrained to acknowledge that the charge was "technically incorrect." ___ Pa. ___, 454 A.2d 937 at 954 While the majority contends that the error was cured by the additional instructions given by the trial court, Id.,[14] as discussed above, such instructions were wholly ineffectual.

In Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), this Honorable Court firmly indicated that careful and adequate jury instructions are mandatory at the sentencing stage of a death penalty case:

> ... the members of the jury will have had little, if any previous experience in sentencing ... and are unlikely to be skilled in dealing with the information they are given.

* * * * * * * * * * *

[14] The majority's further contention that the verdict slip sufficed to cure the error cannot be sustained. First, the verdict slip itself was deficient in that it failed to recite the complete statutory text on the weighing process. Second, even with the verdict slip, the jury could easily have believed that if mitigating circumstances did not outweigh the one aggravating circumstance, then by necessary implication the aggravating one prevailed.

> ... The idea that a jury should be given guidance in its decision-making is ... hardly a novel proposition. Juries are invariably given careful instructions in the law and how to apply it ... When erroneous instructions are given, retrial is often required. It is the hallmark of our legal system that juries be carefully instructed in their deliberations.
> 428 U.S. 153 at 192.

By misleading the jury as to the weighing process, the trial court introduced "[a] level of uncertainty and unreliability in the factfinding process that cannot be tolerated in a capital case." Beck v. Alabama, 447 U.S. 625 at 643, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). See also Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).

5. PETITIONER'S RIGHTS TO DUE PROCESS OF LAW AND TO EQUAL PROTECTION UNDER LAW WERE VIOLATED WHERE THE PENNSYLVANIA SUPREME COURT FAILED TO ENGAGE IN ADEQUATE AND MEANINGFUL REVIEW OF THE APPROPRIATENESS OF THE DEATH PENALTY IN THIS CASE AS COMPARED TO OTHER CAPITAL CASES.

A rational system of appellate review is constitutionally required in order to assure that the sentence of death imposed by a jury will not be arbitrary and capricious. See Woodson v. North Carolina, 428 U.S. 280 at 303, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); Roberts v. Louisiana, 428 U.S. 325 at 335, n. 11, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976). It is not just the existence of appellate review that is constitutionally required, but, particularly in a scheme of jury sentencing, proportionality review. Gregg v. Georgia, 428 U.S. 153 at 206, 96 S.Ct. 2909,

49 L.Ed.2d 859 (1976) (plurality opinion) The plurality in Gregg described the process of proportionality review as follows:

> [T]he Supreme Court of Georgia compares each death sentence with the sentence imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate.

Id. at 198.

* * * * * * * * * *

> If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.

Id. at 206.

In recognition of the proportionality review requirement, the Pennsylvania Sentencing Code provides:

> (h) Review of death sentence.
>
> * * * * * * * * * *
>
> (3) The Supreme Court shall affirm the sentence of death unless it determines that:
>
> (i) the sentence of death was the product of passion, prejudice or any other arbitrary factor;
>
> (ii) the evidence fails to support the finding of an aggravating circumstance specified in subsection (d);[15] or

[15] As discussed, supra, the Pennsylvania Supreme Court did find, although erroneously, that the evidence presented by the Commonwealth supported a finding of an aggravating circumstance.

> (iii) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant.

42 Pa.C.S.A. §9711(h)(3)(i)-(iii).

Notwithstanding the foregoing the Pennsylvania Supreme Court affirmed the sentence of death herein without engaging in any meaningful proprotionality review. Rather than formulating a procedure whereby proportionality review could be achieved in this case, as well as in future cases,[16] the court simply conducted a perfunctory comparison with only one other capital case, (Commonwealth v. Truesdale). Commonwealth v. Zettlemoyer, ___ Pa. ___, 454 A.2d 937 at 962, n. 26a (1982).

That this comparison was woefully deficient cannot be gainsaid. The only similarity between Truesdale and the case herein was that the sole aggravating circumstance in petitioner's case was among those found in Truesdale, to wit, the killing of a prosecution witness. Moreover, in Truesdale, the jury found three aggravating circumstances and no mitigating circumstances.[17]

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[16] Compare the procedure employed in the case at bar with that mandated by the Georgia statutory scheme and followed by the Supreme Court of that state. See Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

[17] The failure of the statutory scheme to require the jury to identify the mitigating circumstances, if any, that it found renders meaningful comparison illusory. In this regard, it should be noted that a specific request that the jury list its findings as to mitigating circumstances was made by counsel and denied by the court. [N.T. Sentencing, p. 41]

Finally, at the time of appellate review in petitioner's case, Truesdale had not been argued or decided by the Pennsylvania Supreme Court.

The need for proportionality review is all the more compelling in a statutory scheme like that in Pennsylvania where neither the jury nor the trial court, in reviewing the jury's determination, has the opportunity to assess the appropriateness of the death penalty.[18]

It is further submitted by petitioner that he should not be denied meaningful review simply because his case was the first to reach the Pennsylvania Supreme Court. To treat petitioner differently on this basis would violate his right to equal protection under law. See Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

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[18] Compare the California Penal Code, §190, et seq. and State v. Wood, wherein the Utah Supreme Court said:

> It is our conclusion that the appropriate standard to be followed by the sentencing authority--judge or jury--in a capital case is the following:
>
> > After considering the totality of the aggravating and mitigating circumstances, you must be pursuaded [sic] beyond a reasonable doubt that total aggravation outweighs total mitigation, and you must further be pursuaded [sic] beyond a reasonable doubt, that the imposition of the death penalty is justified and appropriate in the circumstances....
> >
> > 648 P.2d 71 at 83 (Utah 1982)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 7, 1983

Cite as 484 A.2d 937 (Pa. 1983)

That portion of the Commonwealth urt's Order of August 28, 1982 continuing preliminary injunction against award- contracts pursuant to the bidding and opening procedures to be held on June and 12, 1981 is affirmed. The Order of gust 28, 1982 in all other respects is ersed and vacated and the cause is re- nded for further proceedings consistent ewith.

LARSEN, J., concurs in the result.

McDERMOTT, J., did not participate in consideration or disposition of this case.

COMMONWEALTH of Pennsylvania, Appellee,

v.

Keith ZETTLEMOYER, Appellant.

Supreme Court of Pennsylvania.

Argued Oct. 25, 1982.

Decided Dec. 30, 1982.

Reargument Denied Feb. 7, 1983.

Defendant was convicted before the urt of Common Pleas, Dauphin County, No. 1818 Criminal Division 1980, John C. wling, J., of first-degree murder, sen- ced to death, and he appealed. The Su- me Court, at No. 81-2-292, Larsen, J., d that: (1) since psychologist who testi- d for defendant was unable to speak to e of specific intent and was unable logi- y to relate defendant's underlying men- defect to his uncontrollable act, and e defendant was clearly able to formu- and carry out a plan or design, court not err in refusing to allow psychologist xpress his opinion as to whether defend- possessed sufficient mental capacity to form a specific intent to kill; (2) jury was adequately instructed on defense of diminished capacity; (3) circumstantial evidence supported jury's finding that defendant shot and killed victim in order to prevent him from testifying in pending felony proceeding against defendant; thus, Commonwealth sustained its burden of proving the existence of an aggravating circumstance; and (4) district attorney's remark concerning the "deterrent effect" of death penalty was not improper or prejudicial.

Conviction and sentence affirmed.

Roberts, J., filed a dissenting opinion in which O'Brien, C.J., joined.

Nix, J., filed a dissenting opinion.

1. **Homicide ⇐253(1)**

Evidence that victim was shot first with a .22 caliber weapon, dragged from van into deserted woods, and summarily executed by defendant by two shots of a .357 magnum in order to prevent the victim from testifying against defendant at criminal proceedings was sufficient to establish defendant's guilt of first-degree murder beyond reasonable doubt. 18 Pa.C.S.A. § 2502(a).

2. **Criminal Law ⇐1159.2(10)**

Supreme Court will review, in death penalty cases, the sufficiency of the evidence to sustain a conviction of first-degree murder. 18 Pa.C.S.A. § 2502(a); 42 Pa.C.S.A. § 9711(h).

3. **Criminal Law ⇐46**

Diminished capacity is an extremely limited defense.

4. **Criminal Law ⇐474**

Walzack stands only for the proposition that psychiatric testimony which speaks to the legislatively defined state of mind encompassing a specific intent to kill is admissible; thus, psychiatric testimony is irrelevant, under *Walzack*, unless it speaks to mental disorders affecting the cognitive functions of deliberation and premeditation necessary to formulate a specific intent. 18 Pa. C.S.A. § 2502(a).

5. Criminal Law ⇐486(6)

Commonwealth's objection to question asked defense psychologist, after he diagnosed defendant as a schizoid personality with paranoid features, viz., whether the witness could say with a reasonable degree of medical certainty that defendant's mental illness was of such intensity at the time of the homicide that defendant was not mentally capable of fully forming the specific intent required for a wilful, deliberate and premeditated act, was properly sustained on grounds that no foundation had been laid for the psychologist to express such opinion and that the evidence introduced was irrelevant to the question of whether defendant had the capability of forming specific intent to kill. 18 Pa.C.S.A. § 2502(a).

6. Criminal Law ⇐354

Personality disorders or schizoid/paranoid diagnoses are not relevant to a *Walzack* /diminished capacity defense. 18 Pa. C.S.A. § 2502(a).

7. Criminal Law ⇐456

Testimony of lay witnesses who came in contact with defendant on the morning after the homicide or within a few days of the incident had absolutely no bearing on whether, at time of killing, defendant had the mental capacity to form specific intent to kill, especially in light of the unanimous testimony of all police officers at the scene that defendant was responsive, conversed rationally, and appeared normal until after he had left the scene in police cruiser.

8. Criminal Law ⇐456

Testimony of defendant's grandmother and mother that defendant was a temperamental, spoiled, antisocial young man who could not maintain a job or relationship with women, and who seemed very depressed in the weeks preceding the shooting of his one-time friend, was irrelevant to defendant's ability to form the requisite mens rea for the intentional killing; such testimony shed no light whatsoever on defendant's mental capacity to premeditate, deliberate, and form a specific intent to kill. 18 Pa.C.S.A. § 2502(a).

9. Criminal Law ⇐50

Irresistible impulse is no defense to a criminal charge.

10. Criminal Law ⇐474

Since psychologist who testified in behalf of murder defendant was unable to speak to the issue of specific intent and was unable logically to relate defendant's underlying mental defect to his uncontrollable act, and since defendant was clearly able to formulate and carry out a plan or design, the trial court did not err in refusing to allow the psychologist to express his opinion as to whether defendant possessed sufficient mental capacity to form a specific intent to kill, especially in view of the fact that the psychologist had already testified extensively and the jury was in a position, under proper instructions, to draw its own conclusion as to such issue.

11. Criminal Law ⇐773(2)

Jury was adequately instructed on the defense of diminished capacity.

12. Homicide ⇐230

In the absence of a confession or admission by the actor, purpose and intention of a homicide will, of necessity, require proof of circumstantial evidence and inferences therefrom. 42 Pa.C.S.A. § 9711(d)(5).

13. Homicide ⇐230

In establishing the purpose and intent of homicide, Commonwealth was not required to negate every conceivable inference within the endless realm of human speculation that is consistent with innocence. 42 Pa.C.S.A. § 9711(d)(5).

14. Homicide ⇐354

Circumstantial evidence presented by the Commonwealth overwhelmingly, and beyond a reasonable doubt, supported jury's finding that defendant shot and killed victim in order to prevent him from testifying in pending felony proceeding against defendant; thus, the Commonwealth sustained its burden of proving the existence of an aggravating circumstance of the

nicide. 42 Pa. C.S.A. § 9711(c)(1)(iii), 3), (h)(3)(ii).

Homicide ⇐354

In regard to the sentencing code's ag-vating circumstance of a murder victim ng killed for the purpose of preventing testimony against defendant in any nd jury or criminal proceeding involving elony offense, such aggravating circum-nce is not limited to the killing of an witness only, as opposed to a witness was not present at the scene of the ateral murder or other felony. 42 Pa.C. § 9711(d)(5).

Homicide ⇐354

In regard to the aggravating circum-ce of a homicide being committed for purpose of preventing victim's testimo-against defendant in any grand jury or inal proceeding involving a murder or r felony committed by the defendant, phrase "committed by the defendant" not indicate a desire on the part of the slature to impose upon the Common-lth the additional burden of proving the collateral "murder or other felony" actually committed by defendant. 42 C.S.A. § 9711(d)(5).

Homicide ⇐354

Propriety of sentencing a murder de-ant to death does not depend on wheth-he number of aggravating circumstanc-xceeds the number of mitigating cir-stances; such would reduce review of sentencing process to a "mere numbers e." 42 Pa.C.S.A. § 9711(d, e).

Criminal Law ⇐822(1)

Guiding principle on reviewing an al-dly erroneous jury instruction is that charge is to be read in its entirety.

Criminal Law ⇐823(1)

While the court's charge to the jury, at ncing proceeding following murder iction, regarding the weighing of ag-ating circumstances against mitigating mstances may have been technically rect in part, whatever error occurred completely cured by the court's further uctions. 42 Pa.C.S.A. § 9711(c-e).

20. Criminal Law ⇐829(22)

Trial court's refusal to specifically inform jury that mitigating circumstances need not outweigh aggravating in order to find in favor of life imprisonment was not error; the curative instructions were sufficient to dispel any mistaken impressions the jury may have had, and the court was not required to use the language requested by counsel. 42 Pa.C.S.A. § 9711(c-e).

21. Criminal Law ⇐986.6(3)

In sentencing proceeding following conviction of first-degree murder, the trial court properly allowed the Commonwealth to read to the jury the indictments against defendant in other criminal proceedings, since it was incumbent upon the Commonwealth to demonstrate, as an aggravating circumstance, that defendant's victim was a witness to a "murder or other felony" committed by defendant. 42 Pa.C.S.A. § 9711(d)(5).

22. Criminal Law ⇐1134(8)

Supreme Court has an independent, statutory obligation to determine whether a sentence of death is the product of passion, prejudice, or some other arbitrary factor, whether the sentence is excessive or disproportionate to that imposed in similar cases, and to review the record for sufficiency of the evidence to support aggravating circumstances.

23. Criminal Law ⇐369.2(1)

While the general rule is that it is impermissible, in a criminal trial, to introduce evidence of a defendant's prior convictions simply to demonstrate his bad character or propensity to commit crimes, this rule is subject to numerous exceptions where the prior convictions are relevant to some valid evidentiary purpose.

24. Criminal Law ⇐723(1), 1171.1(6)

District attorney's remark concerning the "deterrent effect" of the death penalty was not improper or prejudicial.

25. Criminal Law ⇐713

Commonwealth, just as defense counsel, must have reasonable latitude in arguing its position to the jury.

26. Homicide ⇐351

Pennsylvania's statutory provisions for appellate review are adequate to insure that the jury's discretion has been channelled so as to prevent the arbitrary and capricious imposition of the death penalty in a first-degree murder case. 18 Pa. C.S.A. § 2502(a); 42 Pa.C.S.A. § 9711.

27. Criminal Law ⇐1206(1)

Meaningful appellate review by a court having statewide jurisdiction is at least a very important factor, perhaps a sine qua non, in a constitutionally permissible legislative scheme for imposition of the death penalty; however, no particular mechanism of appellate review is required.

28. Criminal Law ⇐1206(1)

So long as an appellate court of statewide jurisdiction will conduct a meaningful review of a sentence of death to guard against its arbitrary and capricious imposition, the United States Supreme Court will not interfere with the state's choice of appellate and administrative mechanisms. 42 Pa.C.S.A. § 9711.

29. Criminal Law ⇐1206(2)
Homicide ⇐354

In Pennsylvania, a sentence of death for murder of the first degree involving the aggravating circumstance of killing a prosecution witness is not excessive or disproportionate to the sentence imposed in similar cases. 42 Pa.C.S.A. § 9711(d)(5).

30. Criminal Law ⇐874

Lower court did not abuse its discretion in refusing defense counsel's request to poll the jury, which returned a sentence of death, as to which mitigating circumstances it found. 42 Pa.C.S.A. § 9711.

31. Constitutional Law ⇐270(4)

Due process is not offended by requiring the accused, after the Commonwealth establishes guilt beyond a reasonable doubt of first-degree murder and the existence one or more aggravating circumstances, prove, by a preponderance of the eviden that there are mitigating circumstan which might convinc: jury that the s tence should nevertheless be set at life i prisonment rather than death. 42 Pa.C.S § 9711(c, d); U.S.C.A. Const.Amends. 5,

32. Homicide ⇐351

Sentencing code is not unconstitutior because it supplies no fixed burden of pro as to the weighing of aggravating circu stances against mitigating circumstanc as regards the proper sentence for a d fendant convicted of first-degree murd 42 Pa.C.S.A. § 9711(c)(iv).

33. Homicide ⇐309(3)

Practice in Pennsylvania of instructir the jury in a homicide trial on the elemen of voluntary manslaughter, upon reques whether or not evidence exists to suppo such charge, does not invite the jury t disregard their oaths to apply the law to th evidence, and does not encourage arbitrar and capricious sentencing, as Pennsylvani juries are not mandated to impose the deat penalty in all cases of first-degree murd and are not left without guidelines in th determination of whether to impose deat or life imprisonment.

34. Criminal Law ⇐1213

Capital punishment does not inevitabl violate the prohibition of the Eight Amendment against cruel and unusual pun ishments. U.S.C.A. Const.Amend. 8.

35. Criminal Law ⇐1213

Rights secured by the Pennsylvani prohibition against "cruel punishments" ar coextensive with those secured by th Eighth and Fourteenth Amendments; thus the death penalty is not inevitably "crue punishment" under the Pennsylvania Con stitution. U.S.C.A. Const.Amends. 8, 14 Const. Art. 1, § 13.

Robert N. Tarman, Chief Public Defender, for appellant.

William A. Behe, Deputy Dist. Atty., Richard Lewis, Dist. Atty., Leroy Zimmerman, Atty. Gen., Marion E. MacIntyre, Asst. Atty. Gen., for appellee.

Judah Labovitz, A.C.L.U., amicus curiae.

Before O'BRIEN, C.J., and ROBERTS, NIX, LARSEN, FLAHERTY, McDERMOTT and HUTCHINSON, JJ.

OPINION

LARSEN, Justice.

This appeal raises the issue of the constitutionality of the death penalty which sentence was imposed by a jury upon Keith Zettlemoyer, appellant, pursuant to the procedures set forth in section 9711 of the Sentencing Code, 42 Pa.C.S.A. § 9711.[1] For the reasons stated herein, we affirm appellant's conviction for murder of the first degree, find the sentencing procedures to be valid under both the federal and state constitutions, and uphold the sentence of death.

Appellant was arrested on October 13, 1980 and charged with criminal homicide for the shooting death of Charles DeVetsco. The trial was conducted in the Court of Common Pleas of Dauphin County before the Honorable John C. Dowling. On April 24, 1981, a jury convicted Keith Zettlemoyer of murder of the first degree, and, following a separate sentencing proceeding, that same jury pronounced a sentence of death. Following denial of his post-verdict motions by a court en banc, the case was automatically appealed to this Court. 42 Pa.C.S.A. § 9711(h)(1) and § 722(4).

As established by the Commonwealth's uncontradicted testimony and the reasonable inferences raised therefrom, the facts demonstrate a "carefully planned, brutally carried out, cold-blooded execution of a young man scheduled to testify against the [appellant] in a pending felony trial." Opinion of the Court of Common Pleas of Dauphin County, En Banc, October 16, 1981, denying appellant's post-verdict motions. (Slip opinion at 1.) The evidence discloses the following.

In the early morning hours of October 13, 1980, two officers of the Conrail Police Department were on routine patrol in an unmarked car in the Harrisburg railroad yards when they heard gunfire (two shots) coming from a nearby area. The officers proceeded to the area—an isolated, overgrown, unlit area used for dumping trash. When they arrived, the officers observed a 1967 Ford van parked on a dirt access road leading back to a creek and overgrown with bushes. Hearing rustling noises in the bushes in front of the van, the officers ordered the person making the noise to come out.

At this point, appellant emerged from the bushes holding a .357 magnum Smith and Wesson revolver in his right hand and a flashlight in his left. Appellant exclaimed "What's the matter, guys? I was only shooting rats." Officer Gregory W. Benedek replied "At 4:00 o'clock in the morning?", to which appellant responded "Yes, I do it all the time." The officers ordered appellant to drop his gun which, after hesitating several seconds, he finally did, at which point he was secured.

Sergeant William J. Houtz then retraced appellant's path into the woods and located the still trembling body of the victim, Mr. DeVetsco, lying face down. Charles DeVetsco had been shot four times, twice in the neck with a .22 caliber weapon and twice in

1. This case marks the second occasion this Court has had to review the constitutionality of these procedures adopted by the General Assembly for imposing the death penalty. *See Commonwealth v. Story*, 497 Pa. 273, 440 A.2d 488 (1981), reargument denied on February 5, 1982. The issue remains unresolved, however, as four Justices of this Court have determined that the sentencing procedures adopted by the Act of September 13, 1978 (formerly 18 Pa.C.S.A. § 1311, transferred to 42 Pa.C.S.A. § 9711 by Act of October 5, 1980, P.L. 693, No. 142) were not intended by the legislature to be applied to Stanton Story's conviction for a murder which occurred in 1974. Opinion of the Court per Roberts, J., joined by O'Brien, C.J. and Wilkinson, J.; concurring opinion by Nix, J.; dissenting opinion by Larsen, J., joined by Flaherty and Kauffman, JJ.

the back with the .357 magnum in appellant's hand. The victim had been shot with a .22 caliber weapon while in the van (as indicated by several blood-soaked items, two spent .22 caliber bullet casings, and the weapon, all found in the van), handcuffed, and dragged from the van into the bushes where the fatal shots were fired (as indicated by drag marks and blood drippings).

When appellant emerged from the bushes, he was dressed in dark clothing, wearing dark gloves, and was heavily armed. Found on his person by officers of the Harrisburg Police Department who had quickly arrived on the scene, as well as by Conrail officers, were a hunting knife, 41 rounds of semijacketed hollow point .357 magnum ammunition (more deadly than "normal" ammunition), a shoulder holster, a tear gas cannister, penlight and two handcuff keys.

All of the victim's wounds were consistent with the shooting having been done while the victim was lying face down. The cause of death was massive hemorrhaging of the heart which had been penetrated by the .357 magnum bullets.

The Commonwealth also demonstrated that the victim had worked a short while with the appellant at a retail store and had been scheduled to appear as a witness on behalf of the Commonwealth, and against appellant who was a defendant in a criminal proceeding in Snyder County. During the jury selection portion of those proceedings on October 6, 1981, the Commonwealth indicated, in appellant's presence, that the prosecution intended to call Charles DeVetsco. The trial of that matter was to have begun on October 21, 1981.

[1, 2] Based upon the Commonwealth's uncontradicted evidence, it is clear that the victim was shot first with the .22 caliber weapon, dragged from the van into the deserted woods, and summarily executed by the appellant by two shots of the .357 magnum in order to prevent his (the victim's) testifying against appellant at the Snyder County criminal proceedings. The evidence is, thus, sufficient to establish appellant's guilt of murder of the first degree [2] beyond a reasonable doubt.[3]

I. VALIDITY OF THE CONVICTION OF MURDER OF THE FIRST DEGREE

At trial, appellant admitted general criminal culpability for murder (*see* Notes of Testimony (N.T.), April 20, 1981, at 366; opening argument of defense counsel), but offered a defense of diminished capacity which defense was first recognized in this Court in *Commonwealth v. Walzack*, 468 Pa. 210, 360 A.2d 914 (1976), in an attempt to reduce the degree of guilt from murder of the first to murder of the third degree. (N.T. April 24, 1981 at 788; closing argument of defense counsel). Several of appellant's assertions of trial error are related to this defense.[4]

2. "A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing." 18 Pa.C.S.A. § 2502(a) (Supp.Pamphlet 1982-83).

3. While appellant does not contest the sufficiency of the evidence to sustain a conviction of murder of the first degree, this Court will nevertheless review for sufficiency. In cases in which the death penalty is imposed, the Sentencing Code, 42 Pa.C.S.A. § 9711(h), requires this Court to review the evidence to determine whether it supports the finding of an aggravating circumstance, and to determine whether the sentence of death was the product of "passion, prejudice or some other arbitrary factor", and whether the sentence is "excessive or disproportionate to the penalty imposed in similar cases." To properly perform this statutory obligation, and because "imposition of the death penalty is irrevocable in its finality" and warrants, therefore, the relaxation of our waiver rules, *Commonwealth v. McKenna*, 476 Pa. 428, 437-41, 383 A.2d 174 (1978), this Court shall review, in death penalty cases, the sufficiency of the evidence to sustain a conviction of murder of the first degree. *See* note 19, *infra*.

4. Appellant also asserts numerous other instances of trial and pre-trial error which, having carefully reviewed the record and applicable precedent, we find to be without merit. These assertions of error are: 1) the lower court erred in ordering defense counsel to furnish, prior to trial, the report of the defense psychologist; 2) the court erred in denying appellant's motion to suppress all of the evidence found in a warrantless search of the van oper-

[3,4] In *Walzack*, this Court sustained as relevant the admission of certain psychiatric testimony to the effect that a prefrontal lobotomy negated the required *mens rea* for murder of the first degree, namely, that the actor had formed the specific intent to kill. This Court has quite recently explained that diminished capacity is an extremely limited defense, *Commonwealth v. Weinstein*, — Pa. —, 451 A.2d 1344 (J-7 of 1982) filed October 26, 1982), and that *Walzack* stands only for the proposition that "psychiatric testimony which speaks to the legislatively defined state of mind encompassing a specific intent to kill is admissible." *Id.* at —, 451 A.2d at 1347. Thus, psychiatric testimony is irrelevant, under *Walzack*, unless "it speaks to mental disorders affecting the cognitive functions [of deliberation and premeditation] necessary to formulate a specific intent." *Id.* at —, 451 A.2d at 1347.[5] This Court carefully examined the proferred psychiatric testimony in *Weinstein* and determined that it was no more (nor less) than testimony as to that appellant's irresistable impulses or inability to control himself, and not to his ability to formulate and carry out a plan or design, and was, therefore, irrelevant and inadmissible on the issue of appellant's specific intent to kill. *Id.* at —, 451 A.2d at 1350.

[5] Essentially, as will be seen, such was also the quality of the evidence produced in the instant case. Appellant offered the testimony of nine lay witnesses and a psychologist, Dr. Stanley Schneider, to support his assertion that appellant had a "schizoid personality with paranoid features." (N.T. April 23, 1981 at 714-15). After Dr. Schneider had testified *at length* as to the numerous tests he had made on appellant and had given his diagnosis of "schizoid personality with paranoid features," defense counsel asked the following question: "[W]ith a reasonable degree of medical certainty, was the defendant's mental illness of such an intensity at that time, at the time of the killing, that he was not mentally capable of fully forming the specific intent which is required for a willful, deliberate and premeditated act?" (N.T. April 23, 1982 at 725). The court sustained the Commonwealth's objection to this question on the grounds that no foundation had been laid for the psychologist to express such an opinion and that the evidence that had been introduced was irrelevant to the question of whether appellant had the capability to form the specific intent to kill. This ruling was correct.

Initially, we reject appellant's contention that certain language in two post-*Walzack* cases expressed an intention on the part of this Court to extrapolate the dimensions of the defense of diminished capacity. In *Commonwealth v. Sourbeer*, 492 Pa. 17, 422 A.2d 116 (1980), three Justices of this Court found that the trial court had not erred in giving a jury instruction on diminished capacity which included the statement "[i]f you find the defendant has a diminished capacity due to his *personality disorder*, this diminished capacity may be considered by you . . ." *Id.* at 31, n. 2, 422 A.2d at 121, n. 2. As *Commonwealth v. Weinstein, supra*,

sted by appellant; 3) the court erred in denying certain requested questions for voir dire of prospective jurors; 4) the court erred in denying appellant's objection to exclude all Commonwealth questions for voir dire concerning the death penalty; 5) the court erred in admitting a photograph of the corpse of the victim; 6) the court erred in overruling defense counsel's objections to testimony concerning certain medical tests not actually conducted by the witness; 7) the court erred in denying requested points for charge regarding diminished capacity and voluntary drugged condition so as to negate specific intent; and 8) the court failed to cure certain allegedly prejudicial remarks made by the prosecutor in his closing argument concerning the defense psychologist's testimony. We perceive no jurisprudential benefits to be achieved by discussion of these issues in this opinion.

5. This author continues to express disapproval of the use of psychiatric testimony in such cases unless the testimony is relevant to a determination of sanity under the M'Naghten rule, for the reasons expressed in my concurring opinion in *Commonwealth v. Weinstein, supra* and in Justice McDermott's concurring memorandum in that case.

instructs, this jury charge gave far too liberal an interpretation of *Walzack* and, accordingly, was eminently more favorable to the appellant than a correct charge would have been. *See Commonwealth v. Hamilton*, 459 Pa. 304, 329 A.2d 212 (1974), *cert. denied* 420 U.S. 981, 95 S.Ct. 1411, 43 L.Ed.2d 663 (1974). Accordingly, the statement by the plurality in *Sourbeer* that the jury instruction was "perfectly proper" was only intended to hold that any error was beneficial to the appellant and cannot be read to imply that a "personality disorder" will suffice to demonstrate an accused's diminished capacity.

[6] Similarly, in *Commonwealth v. Brantner*, 486 Pa. 518, 406 A.2d 1011 (1979), the defense had offered psychiatric testimony which indicated that the appellant therein had a "schizoid personality and was paranoid." We did not discuss or consider the relevance of that testimony to the defense of diminished capacity, but, rather, simply stated:

> The prosecution offered appellant's own statement reflecting a consciousness of the consequences of his own acts, and also produced lay testimony going to establish appellant's sanity. Viewing all of the evidence in a light most favorable to the Commonwealth (citation omitted), *we find the evidence more than sufficient to permit the jury to reject any suggestion of diminished capacity* and to find that appellant intended to cause the death of his victims. (citation omitted; emphasis added).

Obviously, *Brantner* cannot be read to support appellant's claim that a diagnosis of "schizoid personality with paranoid features" is relevant to the issue of a defendant's mental capacity to form the specific intent to kill. The trial court considered both *Sourbeer* and *Brantner* and quite properly discarded the notion that personality disorders or schizoid/paranoid diagnoses are relevant to a *Walzack*/diminished capacity defense. *See* N.T. April 23, 1981 at 726–28. Judge Dowling observed:

> Upon reflection I do not believe I should have allowed the testimony [of Dr. Schneider]. I think I have allowed [defense counsel] an extraordinary latitude in describing what is not an untypical criminal personality and I can see no basis for this expert coming to the conclusion that you have asked him.... How he could come to that conclusion even though it is only an opinion, I think all of his testimony could well be stricken.... he has simply described a relatively typical criminal personality.

N.T. at 725–26. An analysis of the defense testimony proves the accuracy of Judge Dowling's observations.

[7] The lay witnesses who came in contact with the appellant on the morning after the homicide or within a few days of the incident, testified that appellant's eyes looked "glassy" or "glazed", that he "stared" a lot, that he was "like in a trance", that he appeared sleepy and unstable, and that he acted like he "could have been" under the influence of drugs or alcohol.[6] None of this testimony is surprising considering that most of these observations were made after appellant had been awake all night in police custody following what must have been a rather exhausting execution, was without the eyeglasses which he normally wore, and was in an atmosphere of incarceration which can never be described as a pleasant experience. Moreover, these witnesses testified that appellant understood the proceedings, his rights, signed his name when asked, and responded, albeit tersely, to orders. The testimony of these witnesses has *absolutely no bearing* on whether, at the time of the killing, appellant had the mental capacity to form the specific intent to kill, especially in light of

6. These witnesses were the district justice before whom appellant was arraigned and his secretary, and various guards and social workers, some in the field of mental health, who observed appellant at the Dauphin County Prison. Appellant was placed in an isolation, padded cell, as the prison officials tend to err on the side of caution regarding a newly admitted prisoner's safety where that prisoner exhibits any signs of instability. *See* N.T. PP. 566-451.

the unanimous testimony of all of the officers at the scene of the crime that appellant was responsive, conversed rationally and appeared normal until after appellant left the scene in a police cruiser.[7]

[8] Also irrelevant to appellant's ability to form the requisite—*mens rea* for an intentional killing was the testimony of appellant's grandmother, Mrs. Thelma A. Zettlemoyer (N.T. at 651–57) and mother, Mrs. Donna Zettlemoyer (N.T. at 657–90). Basically, their testimony profiled appellant as a temperamental, spoiled, anti-social young man (appellant was 25 years old at the time of trial) who could not maintain a job or a relationship with women, and who seemed very depressed in the weeks preceding the shooting of appellant's one-time friend, Charles DeVetsco. Once again, this testimony sheds *no light whatsoever* on appellant's mental capacity to premeditate, deliberate and form the specific intent to kill.

Finally, the defense presented Dr. Schneider, a clinical psychologist who testified extensively over the Commonwealth's objections. Dr. Schneider was given wide latitude in describing his observations and the methods he used to arrive at his diagnosis. Some of his findings were that appellant was not psychotic, possessed average intelligence (I.Q. 98) and scored extremely high in the "deception area" (i.e., he attempted to deceive the tester in at least one of the psychological tests that Dr. Schneider administered.) N.T. at 711, 708, 712–13, 709. Asked to give his "final diagnosis", Dr. Schneider replied: "As a result of the testing, the interview and my conversations with family members, my diagnostic impression is that we have a schizoid personality with paranoid features—well, paranoid and inadequate features." To clarify this diagnosis, Dr. Schneider explained his jargon thusly, N.T. at 715–16:

> Answer: A personality disorder is a lifelong set of rather established, well entrenched personality traits. A schizoid personality is an individual who is eccentric, may be referred to as queer in terms of, not his sexual preferences but his behavior, shy, oversensitive, usually detached, seemingly unemotional in the face of upsetting events and experiences. There is typically a defect in the capacity to form social relationships. There is little or no desire for social involvement. They are usually loners. They have few close friends, reserved, withdrawn, reclusive. They usually pursue solitary interests and jobs, often humorless, dull, cold and aloof. These are typical descriptors of a schizoid personality.
>
> Question: Do you feel specifically that those symptoms or those characteristics that you have just named apply to Mr. Keith Zettlemoyer?
>
> Answer: Yes.
>
> Question: Now, moving on to the term paranoid, would you please describe for the ladies and gentlemen of the jury what that means and what significance to your findings that word means?
>
> Answer: In lay terms it would be a belief that, or an indication that people are out to harm you or hurt you, get you, essentially.

Finally, Dr. Schneider applied his psychological labels to appellant and rendered the following observations:

7. Seven officers testified in the Commonwealth's case in chief that appellant's behavior was normal and rational at the scene. N.T. 367–510. Officer Gregory Benedek said he and appellant had a brief conversation and that the latter still was trying to convince him that appellant had only been shooting rats (this was before Officer Houtz had found the victim). N.T. at 393–94. The officer who "read appellant his rights" testified that appellant understood and responded to five questions and did not appear to be disoriented in any way. N.T. at 500. It was not until other officers were "booking" appellant that he began to exhibit any signs of distress. Testimony of Officers Richard Kahl and Melvin Austin, N.T. at 501–510. (At this time, appellant appeared to faint and was taken to a hospital where blood tests were administered and proved negative regarding drugs or alcohol, except for the presence of some antihistamines and a sedative.)

I also mentioned that Mr. Zettlemoyer is an inadequate person which essentially means that he was unable, as I indicated, to deal with the normal pressures, demands, responsibilities of daily living. He has never completed anything to my knowledge successfully, whether it be socially, personally or vocationally. He has failed and I believe that his reaction *over this period of time resulted in, well, what I refer to as a pressure cooker syndrome, pressure mounting up. If you don't have a release valve it will blow and that's where I believe that the emotional disturbance, in addition to the personality disorder, may have resulted in the behavior.*

* * * * * *

I find that Mr. Zettlemoyer is a pampered, doted upon, catered to, in simple terminology spoiled brat who *figured out how to get what he wanted, either directly or by manipulating or controlling the situation* to get what he wanted his entire life and I believe that *faced with the number of stresses that he had to deal with that he could not cope with,* and he decompensated.

N.T. at 719–21. (emphasis added) (*See also* defense counsel's closing arguments focusing on this asserted "pressure-cooker syndrome". N.T. at 773.)

[9] It should be apparent from the foregoing summary of the "defense", that the psychiatric/psychological testimony of Dr. Schneider falls well short of the objective quantum of reliability and relevance which this Court requires, *Commonwealth v. Stasko*, 471 Pa. 373, 370 A.2d 350, 355–56 (1977), *quoting Commonwealth v. McCusker*, 448 Pa. 382, 388–89, 292 A.2d 286 (1972), before such testimony will be deemed admissible on the issue of whether appellant had the mental capacity to form the specific intent to kill. Moreover, the "defense" offered in this case is simply an attempt to once again foist the "irresistible impulse" concept upon this Court under different nomenclature, an attempt which we have consistently rejected and will continue to resist. *See, e.g., Commonwealth v. Tomlinson*, 446 Pa. 241, 284 A.2d 687 (1971) wherein we stated:

> Defendant in the instant case makes the same contentions as were made in the aforesaid cases, but instead of calling himself a mental defective or a sexual pervert, or some kind of psychopath, or that he had an irresistible impulse, he contends that his is a case of "diminished responsibility." By whatever name psychiatrists, or doctors or lawyers call it, an inability to control one's self under certain circumstances is legally insufficient to justify an acquittal of murder, or a reduction of a first degree murder killing to [a murder of a lesser] degree.
>
> . . . . . .
>
> The doctrine of "irresistible impulse" or in the modern psychiatric vernacular "inability to control one's self", *whether used to denote legal insanity, or as a device to escape criminal responsibility for one's acts or to reduce the crime or its degree, has always been rejected in Pennsylvania.*
>
> . . . . . .
>
> *Such a theory or philosophy would soon transfer the punishment of criminals from Courts to psychiatrists and would inevitably result in a further breakdown of law enforcement and eventual confusion and chaos. Fortunately our cases are opposed to such an undesirable result.* *Id.* at 252–54, 284 A.2d at 696 (citations and references omitted).

[10] Thus, in this case as in *Commonwealth v. Weinstein, supra*, appellant's "expert was unable to speak to the issue of specific intent, recognizable by the law, and was unable logically to relate [appellant's] underlying disease or mental defect to his uncontrollable act. [Appellant] was clearly able to formulate and carry out a plan or design." —— Pa. at ——, 451 A.2d at 1350. Accordingly, the trial court did not err in refusing to allow Dr. Schneider to express his opinion as to whether appellant possessed sufficient mental capacity to form the specific intent to kill, especially in light of the fact that the psychologist had al-

ready testified extensively and the jury was in a position, under proper instructions, to draw its own conclusion as to this issue.[8]

Appellant alleges, however, that the jury did not receive proper instructions. As stated by the court en banc, the appellant "asserts here that the court's charge to the jury on what constituted a defense of diminished capacity left it with the impression that it was not proven in the instant case. 'As is usual in such complaints, isolated portions of the charge are extracted with materially qualifying sentences or phrases conveniently omitted." Slip opinion at 13. The entire charge on diminished capacity was stated as follows, with the portions identified by appellant as objectionable underscored:

> The defense in this case is diminished capacity. That is the term. It is a relatively new term in the law of Pennsylvania. It evolved out of a case, a Pennsylvania decision by the Supreme Court of Pennsylvania in 1976 where, in that case a psychiatrist, they offered the testimony of a psychiatrist that the deceased—or the defendant had had a lobotomy and didn't possess the requisite intent. The Court held that that evidence should have been admitted. I am not saying that it has to be limited to that type of case but that's where it came into the law, this theory of diminished capacity.
>
> What it is, it is a contention that because of the mental capacity of the defendant he did not have the ability to form a specific intent to kill at the time he committed the crime. That is what they are saying....
>
> You must keep this in mind, that we cannot use, when we are talking about something that prevents the defendant from having a specific intent to kill. It is not an excuse for antisocial behaviour. It is not something that excuses someone who is spoiled or pampered or someone who loses their control or judgment under stress, somebody who has a poor life style, is a loser in life, somebody who reacts to stress by violence; that is not what we are talking about. If you are satisfied and the Commonwealth has proven to you beyond a reasonable doubt that he had a specific intent to kill, the defense says because of all these things, because of his personality, he could not form the specific intent to kill. That is what diminished capacity means. He did not have the capacity to form the intent to kill. It is not an excuse for a personality disorder or someone who is antisocial, but it is evidence, and you have heard it from family, you have heard it from a psychologist and you take that evidence into account in deciding the issue as to whether at the time the crime was committed, at the time Mr. DeVetsco was murdered, the defendant had a specific intent to kill him. That is the issue and that is where the evidence becomes relevant.
>
> . . . . . .
>
> The defense is that because of his life style, or his personality, and you have heard all about that, that he lacked the specific intent to kill. Well, if he didn't have it at the time he committed the crime, the specific intent to kill, then he can't be guilty of murder in the first degree.
>
> . . . . . .
>
> The burden of proof rests with the Commonwealth to prove each element of the crime beyond a reasonable doubt. Therefore, in order to meet the burden of proof required for murder of the first degree, the Commonwealth must prove beyond a reasonable doubt that the killing was

8. The Commonwealth objected, at the outset, to Dr. Schneider's qualifications to testify as an expert witness on the issue of diminished capacity. We agree with the Commonwealth that, given the narrow application of *Walzack* as explained in *Weinstein*, the testimony of the medically trained psychiatrist is preferrable to that of the psychologist who has received no education in medicine. However, we express no opinion at this time as to the competence of a psychologist to testify as to diminished capacity. *See Commonwealth v. Williams*, 270 Pa.Super. 27, 410 A.2d 880 (1979), *allocatur denied* March 12, 1980.

willful, deliberate and premeditated and that at the time of the killing the defendant was not acting with a diminished capacity.

* * * * * *

The mere fact that the Commonwealth produced evidence tending to show that the defendant may have had a motive to kill or that he planned and premeditated the killing does not necessarily eliminate the defense of diminished capacity. If you have a reasonable doubt that during that time period in which the defendant planned and premeditated that he suffered a mental illness, defect or abnormality which prevented him from fully forming the specific intent required for murder of the first degree then you must find him not guilty of first degree murder. I affirm that but again, I call your attention to the fact that the defense of diminished capacity is whether or not—the issue is did he possess sufficient mental capacity to form the specific intent required at the time that he committed the killing but, of course, the background may be evidence on that. Now, I commented to you and whatever I said is on the record, I don't recall it verbatim, that diminished capacity does not mean somebody who was antisocial or who was prone to violence or who was temperamental and can't control himself and can't react to stress. I say that again, that should be pretty obvious. However, I am not saying that you should disregard the evidence about the defendant's personality. It is relevant, you may use it as relevant as to whether or not at the time he killed DeVetsco, he had the specific intent to kill.

I also mentioned the case in which this doctrine of diminished capacity came into the law of Pennsylvania and I mentioned to you that it involved an offer of psychiatric testimony concerning that the defendant had a lobotomy. Now, I didn't mean that to say that's the type of case that you have to have, such an extreme case. There have been since then two other cases that I know of and they did not involve this type of illness. I don't recall what they did, what the testimony was but I merely gave you that historically just to show you how it started.

N.T., April 24, 1982, court's charge to the jury.

[11] In viewing the charge in its entirety, as we must, *Commonwealth v. Woodward*, 483 Pa. 1, 4, 394 A.2d 508 (1978), it is evident that the jury was adequately instructed on the defense of diminished capacity. Appellant complains that the underscored portions of the charge and the court's use of such phrases as "inability to deal with stress," "loser in life," "spoiled and pampered," "antisocial personality," "personality disorder," etc., were selected parts of defense testimony and did not correctly and fairly convey the appellant's defense." Brief for appellant at 19.

This complaint is unfounded. Appellant totally isolated these terms from the charge as a whole. The terms were also fully and properly explained in the language of diminished capacity to form the specific intent (premeditation, deliberation) to kill, and were, contrary to appellant's contention, fair and accurate portrayals of appellant's defense as can readily be seen in the testimony of Dr. Schneider as well as in the closing argument of defense counsel.[9]

9. Representative excerpts from defense counsel's closing remarks include the following:

There is evidence of planning, but the person who planned this crime was a sick person. He was a person who was mentally ill.

* * * * * *

There's two ways to look at the District Attorney putting on that evidence. You are probably saying to yourselves, "My God, look at this guy, he was armed to death, he planned it." Now, I am saying to you that that is evidence of a person who is sick.

* * * * * *

The defense is, we heard about this pressure cooker effect. These stresses were building up on him.

* * * * * *

You grow older, you go out to work, your responsibilities start to build and you know some people just can't handle that. That's

The *entire* defense was infested with the language of irresistible impulse and the court was wise to inform the jury which facts did *not* bear upon the defense of diminished capacity. As this Court explicitly stated in *Commonwealth v. Neill*, 362 Pa. 507, 514, 67 A.2d 276, 280 (1949):

> Certainly neither social maladjustment, nor lack of self-control, nor impulsiveness, nor psycho-neurosis, nor emotional instability, nor chronic malaria, nor all of such conditions combined, constitute insanity within the criminal conception of that term.

And see Commonwealth v. Weinstein, supra at —, 451 A.2d at 1346 (McDermott, concurring memorandum, slip opinion at 3). Neither do these conditions bear upon the narrow defense of diminished capacity. In fact, the court would not have committed error in ruling, as a matter of law, that appellant had failed to produce sufficient evidence of diminished capacity and had, therefore, refused to charge on the issue. *See Commonwealth v. Hughes*, 480 Pa. 311, 389 A.2d 1081 (1978) *citing Commonwealth v. Brown*, 462 Pa. 578, 342 A.2d 84 (1975). *See also Commonwealth v. Weinstein, supra* (psychiatric testimony, later introduced at sentencing hearing, properly excluded from guilt stage of proceedings as it was held to be irrelevant to defense of diminished capacity).

VALIDITY OF THE DEATH PENALTY IMPOSED PURSUANT TO SECTION 9711 OF THE SENTENCING CODE

In *Commonwealth v. Bradley*, 449 Pa. 19, 296 A.2d 842 (1972), this Court recognized that under *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), Pennsylvania's then existing capital punishment statute was unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution, and so declared invalid the Act of June 24, 1939, P.L. 872 § 701, *as amended* 18 P.S. § 4701. In apparent response to the void in Pennsylvania law regarding imposition of a death penalty engendered by *Bradley*, the General Assembly in 1972 adopted section 1102 of the Crimes Code which merely stated "[a] person who has been convicted of murder of the first degree shall be sentenced to death or to a term of life imprisonment." *Commonwealth v. McKenna*, 476 Pa. 428, 435, 383 A.2d 174, 178 (1978). As it was "manifest that in no way could § 1102 have been designed to cure the constitutional infirmities of the Act of 1939 . . .", it seemed that "§ 1102 had no purpose other than to provide some legislative authority for the imposition of a death sentence until the General Assembly could formulate an adequate response to the implications of the *Furman* decision." *Id.*

In 1974, the legislature enacted section 1311 of the Sentencing Code, 18 Pa.C.S.A. § 1311, Act of March 26, 1974, P.L. 214, No. 46, in an attempt to comply with the *Furman* and *Bradley* decisions. This attempt failed. While section 1311 did provide sentencing procedures intended to channel the jury's discretion (and thus avoid the danger of the death penalty being imposed in a wanton and freakish, arbitrary and capricious manner, *Furman v. Georgia, supra* 408 U.S. at 310, 92 S.Ct. at 2762 (Stewart, J., concurring), at 313, 92 S.Ct. at 2764 (White, J., concurring), and at 256–57, 92 S.Ct. at 2735–2736 (Douglas, J., concurring)), it went too far in excluding from jury consideration evidence pertaining to the individual history and character of the offender. *Commonwealth v. Moody*, 476 Pa. 223, 231, 382 A.2d 442 (1977). Accordingly, this Court held, based upon *Furman* and the

> what happens when people have nervous breakdowns.
>
> * * * * * *
>
> [A]ll these problems that he had, if you look, if you consider the way these stresses were building up inside of him to the point where the man was really driven to a point of absolutely no judgment, even if he was responsible for some of those stresses, the fact is they were there.
>
> N.T. April 23, 1974 at 772–87.

1976 quintet of same-day United States Supreme Court decisions,[10] that:

> [I]n our view, in order to protect a defendant from cruel and unusual punishment in a capital case, it is now necessary both that the aggravating circumstances that will justify the imposition of the death penalty be clearly defined for the sentencing authority, and that the sentencing authority be allowed to consider whatever mitigating evidence relevant to his character and record the defendant can present.

On September 13, 1978, in yet another attempt to adopt a constitutionally valid procedure by which capital punishment could be inflicted, the General Assembly enacted the current sentencing procedures set forth at section 9711 of the Sentencing Code, 42 Pa.C.S.A. § 9711,[11] pursuant to which appellant was sentenced to death. These procedures retain the split-verdict provisions of the previous acts by which, if a jury returns a verdict of murder of the first degree, a separate sentencing proceeding is then held before the same jury panel at which both sides may present arguments and additional evidence relative to the circumstances of the offense and the history and character of the defendant. § 9711(d).[12] The court then instructs the jury on the aggravating circumstances specified in subsection (d)[13], mitigating circumstances specified in subsection (e)[14], the re-

10. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976).

11. Formerly 18 Pa.C.S.A. § 1311, transferred to chapter 97 of the Judicial Code, 42 Pa.C.S.A. § 9711, by § 401(a) of the Act of October 5, 1980, P.L. 693, No. 142.

12. If the defendant has pleaded guilty or has waived a jury trial, a jury may nevertheless be impaneled for the sentencing proceeding. § 9711(b).

13. The aggravating circumstances, which must be proved by the Commonwealth beyond a reasonable doubt, are limited to the following:

> (1) The victim was a fireman, peace officer or public servant concerned in official detention as defined in 18 Pa.C.S. § 5121 (relating to escape), who was killed in the performance of his duties.
>
> (2) The defendant paid or was paid by another person or had contracted to pay or be paid by another person or has conspired to pay or be paid by another person for the killing of the victim.
>
> (3) The victim was being held by the defendant for ransom or reward, or as a shield or hostage.
>
> (4) The death of the victim occurred while defendant was engaged in the hijacking of an aircraft.
>
> (5) The victim was a prosecution witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceeding involving such offenses.
>
> (6) The defendant committed a killing while in the perpetration of a felony.
>
> (7) In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim to the offense.
>
> (8) The offense was committed by means of torture.
>
> (9) The defendant has a significant history of felony convictions involving the use or threat of violence to the person.
>
> (10) The defendant has been convicted of another Federal or State offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense.

14. Mitigating circumstances must be proven by the defendant by a preponderance of the evidence, and include the following:

> (1) The defendant has no significant history of prior criminal convictions.
>
> (2) The defendant was under the influence of extreme mental or emotional disturbance.
>
> (3) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
>
> (4) The age of the defendant at the time of the crime.
>
> (5) The defendant acted under extreme duress, although not such duress as to constitute a defense to prosecution under 18 Pa.C.S. § 309 (relating to duress), or acted under the substantial domination of another person.

spective burdens of proof as to these circumstances, and the weighing process to be performed. § 9711(c). The jury must return a verdict of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstances, or unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. § 9711(c)(1)(iv). In all other cases, the jury must return a verdict of life imprisonment. In either event, the jury is required to set forth its findings in writing on a form designated by the court. § 9711(f).

Automatic review by this Court is provided. § 9711(h)(1). In addition to our authority to correct errors at trial, the statute also requires this Court to review the sentence of death, which shall be affirmed unless it is determined that the sentence was the product of passion, prejudice or any other arbitrary factor, that the evidence fails to support the finding of an aggravating circumstance, or that the sentence of death is excessive or disproportionate to the penalty imposed in similar cases considering both the circumstances of the offense and the character and record of the defendant. § 9711(h)(3)(i–iii).

It is apparent that, by this Act, the General Assembly has diligently attempted to perform the delicate balance required by the federal and state constitutions as interpreted by the United States Supreme Court and by this Court. Part III of this opinion will discuss the success of these efforts. Part II addresses appellant's non-constitutional arguments concerning the validity of his sentence.

II. VALIDITY OF SENTENCE—NON-CONSTITUTIONAL ISSUES

Appellant first contends that the Commonwealth has failed to meet its burden of proving an aggravating circumstance beyond a reasonable doubt. 42 Pa.C.S.A. § 9711(c)(1)(iii) and (h)(3)(ii). The only aggravating circumstance identified by the Commonwealth, and found by the jury, was "[t]he victim was a prosecution witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceeding involving such offenses." 42 Pa.C.S.A. § 9711(d)(5).[15]

[12–14] Appellant argues that the Commonwealth failed to prove beyond a reasonable doubt that he had killed Charles DeVetsco in order to prevent him from testifying at a criminal proceeding. Appellant suggests that, since Mrs. Donna Zettlemoyer had testified that the victim and her son had been friends, such "friendship" gives "rise to an equally speculative inference that the slaying was primarily motivated by other factors—e.g., betrayal, mistrust, etc. —and not to prevent testimony against the appellant". Brief for appellant at 70. This suggestion evaporates when exposed to the record. *All* of the evidence at trial and at the sentencing hearing raised the singular inference that the killing was motivated by appellant's desire to prevent the victim from testifying in the Snyder County criminal proceedings. Not one iota of evidence can be read to raise an inference of another purpose—surely not the testimony of appellant's mother that at one time appellant and the victim were "*friends*". In the absence of a confession or admission by the actor, purpose and intention will, of necessity, require proof by circumstantial evidence and inferences therefrom. *E.g., Commonwealth v. O'Searo*, 466 Pa. 224, 352 A.2d 30, 35–38 (1976) (specific intent to kill may be

(6) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal acts.

(7) The defendant's participation in the homicidal act was relatively minor.

(8) Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.

15. On the verdict slip, the jury had hand-written that the aggravating circumstance "is the murdering of a prosecution witness to prevent testimony in a felony case".

inferred by the use of deadly weapon directed at vital parts of body). The Commonwealth is not required to negate every *conceivable* inference within the endless realm of human speculation that is consistent with innocence. *See, e.g., Commonwealth v. Williams*, 476 Pa. 557, 383 A.2d 503, 507 (1978) *and Commonwealth v. Sullivan*, 472 Pa. 129, 371 A.2d 468, 479 (1977). The circumstantial evidence presented by the Commonwealth overwhelmingly, and beyond a reasonable doubt, supports the jury's finding that appellant shot and killed Mr. DeVetsco in order to prevent him from testifying in the felony proceedings in Snyder County.

[15] Appellant also makes the frivolous argument that section 9711(d)(5) should be limited to the killing of an "eyewitness" only, as opposed to a witness who was not present at the scene of the collateral "murder or other felony". Such an interpretation defies logic, common sense, the plain and unambiguous meaning of the statute, and the obvious intention of the drafters who quite clearly were concerned with the type of frontal assault upon the criminal justice system of this Commonwealth as is presented by this case. The damage to that system is equally severe whether the executed witness be the relatively rare (in such cases) eyewitness or otherwise. Because the "General Assembly does not intend a result that is absurd, impossible of execution or unreasonable," the Statutory Construction Act of 1972, 1 Pa.C.S.A. § 1922(1), we reject appellant's artificial dichotomy.

[16] For the same reasons, we also reject appellant's closely related argument that the phrase "committed by the defendant" indicates a desire on the part of the legislature to impose upon the Commonwealth the additional burden of proving that the collateral "murder or other felony" must have been *actually* committed by the defendant. Such a burden would be unreasonable and frequently impossible of execution, because, by eliminating critical prosecution witnesses, a criminal defendant could make certain that the Commonwealth could not meet that burden. The criminal justice system receives a shocking jolt when a defendant flaunts the law enforcement authority of the Commonwealth by murdering a prosecution witness. The tremors felt throughout that system are extreme and are not diminished in cases where, *by that very act of murder*, the Commonwealth may be prevented from proving that the defendant actually committed the collateral crimes with which he was charged.

Moreover, the burden of proving appellant actually committed the underlying felonies would be particularly onerous in this case, where defense counsel admitted to the court below that Mr. Zettlemoyer had *in fact been convicted* of most of the felonies charged, and acquiesced in the court's analysis that section 9711(d)(5) was concerned with the fact that criminal proceedings were *pending* and not with convictions. The Commonwealth could easily have produced proof of the admitted convictions, but defense counsel's acquiescence to the court's proper interpretation of subsection (d)(5) rendered that proof unnecessary.[18]

[17] From the foregoing, we hold that the Commonwealth has sustained its burden

18. At the sentencing proceeding, defense counsel objected, at side-bar, to the reading of the Snyder County indictments, "especially in light of the fact that [appellant had] not been convicted on all those charges that the district attorney has related but, first of all, I would object to the naming the felony charges at all...." N.T. April 24, 1981 at 4-5. The court replied that "[i]t is not the conviction. It is what was pending at the time." Counsel agreed: "Yes. I am just objecting to actually naming [the charges]." N.T. at 5. Later, counsel objected to the sufficiency of the Commonwealth's proof of an aggravating circumstance specifying only that the victim must have been an "eyewitness" and that the Commonwealth failed to introduce a subpoena of Mr. DeVetsco. N.T. at 10-11. (The latter argument, also frivolous, has been abandoned by appellant). Further, when requesting a charge on the mitigating circumstance of no significant prior criminal convictions, § 9711(e)(1), counsel informed the court that appellant had "been convicted but not sentenced in the Snyder County proceedings." N.T. at 12.

of proving, beyond a reasonable doubt, the existence of the aggravating circumstance of "killing a prosecution witness to a murder or other felony committed by the defendant ... for the purpose of preventing his testimony against the defendant in any ... criminal proceeding involving such offenses." [17]

[18] Appellant next alleges the court's charge to the jury regarding the weighing of aggravating circumstances against mitigating circumstances was erroneous and prejudicial. Again, the guiding principle on reviewing an allegedly erroneous jury instruction is that the charge is to be read in its entirety. *Commonwealth v. Woodward*, *supra*. The relevant portions of the court's charge, with the asserted erroneous portions underscored, are as follows:

> You are to decide whether there are certain aggravating circumstances or mitigating circumstances and depending upon how you find those circumstances, as I will explain to you, your decision follows. It must follow. If you find a certain way, a certain penalty must follow. That is the law. If, for example, as I will explain in a little more detail, you find unanimously beyond a reasonable doubt, that there is an aggravating circumstance and no mitigating circumstances or that the aggravating circumstance outweighs the mitigating circumstances, you must return a verdict of death. So the burden is not really yours. That is the law that you took an oath to uphold. If you do not, on the other hand, if you find that the mitigating circumstances outweigh the aggravating circumstances, or that there is no aggravating circumstances, then you must return a verdict of life imprisonment.
>
> . . . . . .
>
> The verdict, of course, must be unanimous. Again, if you find unanimously, beyond a reasonable doubt, the aggravating circumstance that I have mentioned, the only one that's applicable, that the victim was a prosecution witness to a felony and it was committed and he was murdered so that he would not testify, that is an aggravating circumstance. If you find that aggravating circumstance and find no mitigating circumstances or if you find that the aggravating circumstance which I mentioned to you outweighs any mitigating circumstance you find, your verdict must be the death penalty. If, on the other hand, you find that the Commonwealth has not proven an aggravating circumstance beyond a reasonable doubt or if they have, that the mitigating circumstances outweigh the aggravating circumstances, then you must bring in a verdict of life imprisonment. N.T. at 33, 36.

[19] At this point, defense counsel objected that the charge did not comport with the instruction mandated by the Sentencing Code. Subsection (c) sets forth the following:

> (1) Before the jury retires to consider the sentencing verdict, the court shall instruct the jury on the following matters:
>
> (i) the aggravating circumstances specified in subsection (d) as to which there is some evidence.
>
> (ii) the mitigating circumstances specified in subsection (e) as to which there is some evidence.
>
> (iii) aggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt; mitigating circumstances must be proved by the defendant by a preponderance of the evidence.
>
> (iv) the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance speci-

17. Appellant also argues that the verdict of death was against the weight of the evidence. Essentially, this argument is that, since the Commonwealth offered evidence of only one aggravating circumstance and since the defense offered evidence relating to five mitigating circumstances (§ 9711(e)(1–4, 8)), the "weight" of the evidence did not support the jury's finding. This argument is preposterous as it would reduce review of the sentencing process to a "mere numbers game". Opinion of lower court, en banc, slip opinion at 29.

fied in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.

(v) the court may, in its discretion, discharge the jury if it is of the opinion that further deliberation will not result in a unanimous agreement as to the sentence, in which case the court shall sentence the defendant to life imprisonment.

(2) The court shall instruct the jury on any other matter that may be just and proper under the circumstances.

Comparing the underscored portion of the jury charge with the mandated instructions, it does seem that the charge was technically incorrect in part.[18] However, whatever error may have occurred was completely cured by further instructions. First, the court gave these instructions regarding the verdict slip:

> The verdict slip, I have death or life imprisonment; you check whatever it is. If you sentence him to death, then you have to give us the reason. There's two possibilities; you check which one. One aggravating circumstance and no mitigating; then you must list the aggravating circumstance, the killing of a witness to a felony, or you may check, aggravating circumstance outweighs the mitigating circumstance. Again, you indicate what the aggravating circumstance is and in this case, there is only one aggravating circumstance in issue. N.T. at 37.

Second, this verdict slip which accompanied the jury into the deliberation room, clearly and in writing instructed the jury that the death penalty was required if there was "at least one aggravating circumstance and no mitigating circumstance," or, as was checked by the jury foreman, if "the aggravating circumstance outweighs the mitigating circumstances".

[20] Finally, in response to counsel's objections, the court gave the following additional instructions:

> I will try to summarize it, ladies and gentlemen. I don't want to get anybody mixed up on a matter of semantics. Under the law, as I said, you are obligated by your oath of office to fix the penalty at death if you unanimously agree and find beyond a reasonable doubt that there is an aggravating circumstances and either no mitigating circumstance or that the aggravating circumstance outweighs any mitigating circumstances. Now, there has been evidence from which you could find mitigating circumstances. In fact, the one mitigating circumstance is agreed to, that he has no significant history of prior criminal convictions, but what you have to decide is whether the aggravating circumstance, if you find such, outweighs any mitigating and if it does, then your penalty must be death. N.T. at 39.

When read in its entirety, the court's instructions on the weighing process was correct, any possible error having been cured by subsequent instruction. *Commonwealth v. Hughes*, 477 Pa. 180, 383 A.2d 882 (1978); *Commonwealth v. Rodgers*, 459 Pa. 129, 327 A.2d 118 (1974). Nor was it erroneous, as appellant further contends, for the court to refuse to specifically inform the jury that mitigating circumstances need not outweigh aggravating in order to find in favor of life imprisonment. The curative instructions were sufficient to dispel any mistaken impressions the jury may have had, and the court was not required to use the language

18. "Technically" because the charge, fairly read in its entirety, was correct in charging that where aggravating outweighs mitigating, a death verdict must be rendered, and also was correct in charging that, where mitigating outweighs aggravating, a life sentence must be returned. The charge, then, reveals a slight lacuna which would manifest itself only in the unlikely event that the jury considered the evidence of aggravating circumstances to *exactly* equal the mitigating circumstances, for that situation was not covered by the above quoted portions of the charge. As explained further in text, *infra*, the lacuna was filled by the subsequent instructions of the court.

requested by counsel. *See Commonwealth v. Lesher*, 473 Pa. 141, 373 A.2d 1088 (1977) (court free to use its own form of expression; only issue is whether area is adequately, accurately and clearly presented to jury).

[21, 22] It is next argued that the court erred in permitting the Commonwealth to read to the jury the indictments in the Snyder County criminal proceedings.[19] Under the circumstances of this case, we find no error in allowing the indictments to have been read, nor do we find the sentence of death to have been the product of passion, prejudice or any other arbitrary factor. 42 Pa.C.S.A. § 9711(h)(3)(i).

[23] It is true that, as a general rule, it is impermissible, in a criminal trial, to introduce evidence of a defendant's prior convictions simply to demonstrate his bad character or propensity to commit crimes. *Commonwealth v. Spruill*, 480 Pa. 601, 606, 391 A.2d 1048 (1978). However, this rule is subject to numerous exceptions where the prior convictions are relevant to some valid evidentiary purpose. *Commonwealth v. Lasch*, 464 Pa. 573, 347 A.2d 690 (1975).

In the instant case, it was incumbent upon the Commonwealth to demonstrate that appellant's victim was a witness to a "murder or other *felony* . . .". In order to prove that the Snyder County criminal proceeding was a *felony* prosecution, the Commonwealth chose to read the indictments in that case. Defense counsel objected, stating that only the *fact* that the proceedings were of a felony nature, and not the *facts* of the indictments, should be admitted. The objection was overruled and the prosecutor read the indictments in a neutral manner.[20]

19. This issue was not raised in post-verdict motions and is, accordingly, waived. *Commonwealth v. Gravely*, 486 Pa. 194, 404 A.2d 1296 (1979). However, for the reasons stated in *Commonwealth v. McKenna*, 476 Pa. 428, 437-41, 383 A.2d 174 (1978), and because this Court has an independent, statutory obligation to determine whether a sentence of death was the product of passion, prejudice or some other arbitrary factor, whether the sentence is excessive or disproportionate to that imposed in similar cases, and to review the record for sufficiency of the evidence to support aggravating circumstances, we will not adhere strictly to our normal rules of waiver. The primary reason for this limited relaxation of waiver rules is that, due to the final and irrevocable nature of the death penalty, the appellant will have no opportunity for post-conviction relief wherein he could raise, say, an assertion of ineffectiveness of counsel for failure to preserve an issue or some other reason that might qualify as an extraordinary circumstance for failure to raise an issue. 19 P.S. § 1180-4(2). Accordingly, significant issues perceived *sua sponte* by this Court, or raised by the parties, will be addressed and, if possible from the record, resolved.

20. The indictments, in their entirety, were presented as follows (N.T. 6-9):

MR. LEWIS: Your Honor, the Commonwealth's evidence has been agreed to by stipulation and is as follows: that the grand jury of Snyder County, Pennsylvania, in reference to No. 95 of 1980, case entitled Commonwealth of Pennsylvania versus Keith Zettlemoyer, R.D. 2, Selinsgrove, Pa., that on May 26, 1980, the Grand Jury of Snyder County indicted Keith Zettlemoyer on the following counts: "Count No. 1, on or about May 26, 1980, the defendant did unlawfully, knowingly and with the intent of promoting or facilitating the commission of a crime, agree with another person or persons, namely Kenneth Eugene Kipple, that they or one or more of them would engage in conduct which constitutes a crime or crimes or an attempt or solicitation to commit such crime or crimes, namely, theft, burglary, theft, robbery, kidnapping, unlawful restraint, violation of the Uniform Firearms Act and unauthorized use of a motor vehicle, and receiving stolen property, or agreed to aid such other person or persons in the commission of such crime or crimes, or of an attempt or solicitation to commit such crime or crimes, and that a substantial step was taken with intent of fulfilling the criminal objective said conspiracy, a felony of the second degree, in violation of Section 903 of the Pennsylvania Crimes Code;

Count No. 2, that the defendant did on or about May 26, 1980, unlawfully and feloniously enter a building in Monroe Township, Snyder County, Pennsylvania, namely the Susquehanna Valley Mall with intent to commit a crime therein; that is to say with intent to commit theft by unlawfully taking movable property of the said Susquehanna Valley Mall and/or burglary and theft of various stores within the Susquehanna Valley Mall. Said premises were not open to the public at the time, nor was the defendant licensed or privileged to enter, in violation of Section 3502(a) of the Pennsylvania Crimes Code, a felony of the first degree of the Crimes Code, 18 Purdon's Statutes, 3502(a);

Immediately after the indictments were read, the court informed the jury:

> Ladies and gentlemen, the sole purpose of reading that, we are not concerned as such with those charges but under the law, one of the aggravating circumstances under which the death penalty may be brought, and I will explain this more fully, one of the aggravating circumstances is that the victim was a prosecution witness to a felony committed by the defendant was killed for the purpose of preventing his testimony against the defendant, and that was the purpose of admitting this evidence, and the sole purpose of it. N.T. at 9–10.

In light of the essential evidentiary value of the felony charges, the neutral and unimpassioned reading of the indictments, the immediate clarifying instruction by the court, and the fact that, by the evidence presented at the first stage of these proceedings, the jury was already fully aware that appellant was on trial for serious criminal charges in Snyder County, we find no error in permitting the Commonwealth to proceed in this manner.[21]

Appellant also contends that the court erred in refusing his motion for a mistrial following allegedly improper and prejudicial remarks by the prosecutor pertaining to the deterrent effect of the death penalty. As stated in *Commonwealth v. Brown*, 489 Pa. 285, 297–98, 414 A.2d 70 (1980):

> The primary guideline in assessing a claim of error of this nature is to determine whether the unavoidable effect of the contested comments was to prejudice the jury, forming in their minds fixed

Count No. 3, that the defendant did, on or about May 26, 1980, unlawfully and feloniously enter a separately secured portion of a building in Monroe Township, Snyder County, Pennsylvania, namely, the Radio Shack, a separately secured structure within the Susquehanna Valley Mall, with intent to commit a crime therein, that is to say, with intent to commit theft by unlawfully taking movable property of the said Radio Shack. Said premises were not open to the public at the time, nor was defendant licensed or privileged to enter, in violation of Section 3502(a) of the Crimes Code, a felony of the first degree, of the Crimes Code;

Count No. 4, this is continued and pages two of the Grand Jury's indictment of May 26, Count No. 4, that the defendant on or about May 26, 1980, did unlawfully take or exercise unlawful control over movable property of the Radio Shack and Charles D. Fox with intent to deprive them thereof; namely, cash, a Realistic 3 Channel—

THE COURT: I don't think we need to detail it.

MR. LEWIS: All right. "—having a value, all the property mentioned, having a value of more than two thousand dollars, which constitutes a felony of the third degree, in violation of Section 3921(a) of the Crimes Code;

Count No. 5, that the defendant did, on or about May 26, 1980, unlawfully and feloniously, in the course of committing a theft, threaten another with or intentionally put another, namely Charles D. Fox, in fear of serious bodily injury, a felony of the first degree, in violation of Section 3701(a)(ii) of the Crimes Code;

Count No. 6, that the defendant did, on or about May 26, 1980, unlawfully and feloniously remove another person a substantial distance or unlawfully confine another, namely Charles D. Fox, for a substantial period in a period of isolation, with intent to facilitate commission of a felony of flight thereafter, a felony of the first degree, in violation of Section 2901(a)(2) of the Crimes Code;

Count No. 7, that the defendant did, on May 26, 1980, unlawfully and knowingly, restrain another, namely Charles D. Fox, in circumstances exposing him to risk of serious bodily injury, a misdemeanor of the first degree in violation of Section 2902 of the Crimes Code—

MR. TARMAN: Your Honor, I certainly object to that.

THE COURT: Yes. We won't read misdemeanors. Any other felonies?

MR. LEWIS: Count No. 10, that the defendant did, on or about May 26, 1980, unlawfully and intentionally receive and retain property belonging to Radio Shack and Charles D. Fox, namely, cash and communication equipment, knowing that said property had been stolen or believing that it had been stolen and with no intent to restore same to owner, said property having a value in excess of two thousand dollars, a felony of the third degree, in violation of Section 3925(a) of the Crimes Code.

This is signed by the Grand Jury Foreman on the date I previously mentioned. N.T. at 6–9.

21. It is certainly conceivable that the reading of a "loaded" indictment, *i.e.*, one drafted with full disclosure of gory and/or inflammatory factual details, could so inflame the jury that the possibility of prejudice would outweigh the evidentiary value of reading the indictments. We are not confronted with that problem in the instant case.

bias and hostility towards the accused so as to hinder an objective weighing of the evidence and impede the rendering of a true verdict. *Commonwealth v. McNeal*, 456 Pa. 394, 319 A.2d 669 (1974); *Commonwealth v. Van Cliff*, 483 Pa. 576, 397 A.2d 1173 (1979). In making such a judgment, we must not lose sight of the fact that the trial is an adversary proceeding. Code of Professional Responsibility, Canon 7, E.C. 7-19—7-39, and the prosecution, like the defense, must be accorded reasonable latitude in fairly presenting its version of the case to the jury. *Commonwealth v. Cronin*, 464 Pa. 138, 346 A.2d 59 (1975). Nevertheless, we do require that the contentions advanced must be confined to the evidence and the legitimate inferences to be drawn therefrom. *Commonwealth v. Revty*, 448 Pa. 512, 295 A.2d 300 (1972). Deliberate attempts to destroy the objectivity and impartiality of the finder of fact so as to cause the verdict to be a product of the emotion rather than reflective judgment will not be tolerated. *Commonwealth v. Story*, 476 Pa. 391, 383 A.2d 155 (1978). The verdict must flow from the respective strengths and weaknesses of the evidence presented and not represent a response to inflammatory pleas for either leniency or vengeance. *Commonwealth v. Starks*, 479 Pa. 51, 387 A.2d 829 (1978).

In his brief closing argument at the sentencing proceeding, the district attorney began with an appeal to the jury to judge the case solely and exclusively on the facts and the law, and to avoid any temptation to enter a verdict based on emotions. The prosecutor, of course, informed the jury that the Commonwealth was seeking the death penalty because the legislature had determined the killing of a witness is a criminal prosecution to be an attack on our system of criminal justice, warranting the severest sanction of that system which he sought to destroy. The following exchange then took place:

DISTRICT ATTORNEY: You have to consider, number one, the appropriate punishment and number two, you have to consider what, if any, deterrent effect your decision should have—

DEFENSE COUNSEL: Your Honor, I would object to the deterrent effect. I think the District Attorney should be only allowed to argue the law, that the law is specific that only those aggravating circumstances in the law can be considered. The deterrent effect of the death penalty has no place in their deliberations.

THE COURT: Overruled. Proceed.

DISTRICT ATTORNEY: You, as the jury, have a right to consider upholding the system. You, as the jury, have a right to consider what effect your decision as to the penalty we impose on Mr. Zettlemoyer, what place the deterrent effect should play in that decision and I submit to you it is a very important one and it is a very crucial one.

The Commonwealth simply asks for a just decision in this case. We ask for a just decision based on everything you have heard during the trial. Incorporate all this testimony in your deliberations. You heard it, you were right here in the room, you heard everything. We submit to you that the death penalty in this case is justified because of the nature of the crime, because of its attack upon our system of justice and we ask you to consider all those factors.

Thank you very much for your attention.

[24] Appellant claims that the district attorney's references to the "deterrent effect" was improper because it has never been conclusively proven that the death penalty serves as a meaningful deterrent to murder and that it was improper, therefore, to refer to an "unproven" fact. Appellant is correct that, despite the Herculean efforts of lawmakers, scholars, and sociologists to prove whether the death penalty has, in fact, any significant deterrent effect, no conclusive proof has been forthcoming. *See, e.g., Gregg v. Georgia*, *supra* 428 U.S. at 233-34, 96 S.Ct. at 2973-74 (Mar-

shall, J., dissenting), citing *Furman v. Georgia*, 408 U.S. 238, 345–354, 92 S.Ct. 2726, 2780–2784, 33 L.Ed.2d 346 (Marshall, J., concurring). Appellant is not correct, however, in arguing that this remark by the district attorney was improper or prejudicial.

[25] As noted, the Commonwealth, just as the defense counsel, must have reasonable latitude in arguing his position to the jury. *Commonwealth v. Smith*, 490 Pa. 380, 416 A.2d 986 (1980). The Sentencing Code itself provides that after "the presentation of evidence, the court shall permit counsel to present argument for or against the sentence of death." 42 Pa.C.S.A. § 9711(a)(3). The court en banc held that the district attorney's summation, which was "calm, not inflammatory and quite professional", did not exceed the reasonable latitude granted counsel to argue for the death penalty, finding that, although there was no evidence presented on the issue of deterrent effect, it was a matter of "common public knowledge based on ordinary human experience".

This same conclusion was reached by Mr. Justice White, announcing the result of the Court in *Gregg v. Georgia*, *supra*, wherein he stated that, despite the lack of statistical data supporting or refuting the "deterrence" of the death penalty, there are many would-be murderers for whom "the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act. Other types of calculated murders ... include ... the execution-style killing of witnesses to a crime." 428 U.S. at 186–87, and 187 n. 33, 96 S.Ct. at 2931–2932, and 2931 n. 33. The prosecutor's remarks about deterrence followed immediately after the prosecutor's discussion of this type of calculated execution of a witness and asked the jury, only briefly, to consider the deterrent effect of the death penalty in such cases. We do not believe that the impact of this statement, which is a "matter of common public knowledge based on ordinary human experience," [22] would have biased or prejudiced the jury or hindered an objective weighing of the evidence, especially considering the district attorney's explicit directions to the jury to return a verdict of death "solely and exclusively as the law indicates it may be [imposed], based on the circumstances of this case, that it involved a premeditated, intentional killing of a witness to a serious crime, a felony." N.T. at 31.[23] We have examined the record of these proceedings and find that neither this disputed remark of the prosecutor nor any other factor indicates that the sentence of death may have been the product of passion, prejudice or in any way arbitrary. 42 Pa.C.S.A. § 9711(h)(3)(i).

III. VALIDITY OF SENTENCE—CONSTITUTIONAL ARGUMENTS

It should be apparent that the latest version of the Sentencing Code has responded to the announcements of this Court, *Commonwealth v. Moody*, 476 Pa. 223, 382 A.2d 442 (1977) and of the United States Supreme Court, *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). The constitutional deficiencies identified in those cases was the failure to permit the jury to consider a sufficiently broad spectrum of circumstances relating to the character of the offender, as well as to the circumstances of the offense. The legislature has now cured this deficiency in providing that the jury can consider a wide range of seven specific mitigating circum-

22. The ABA Standards for Criminal Justice, § 3-5.9, approve the prosecutor's reference to such off-the-record "facts".

23. Additionally, it should be noted that defense counsel was given extremely wide latitude to refer to items dehors the record, including the diminished capacity of President Reagan's assailant and the "sickness" of the "guy down in Atlanta". The ABA Standards for Criminal Justice, § 3-5.8, make it clear that the latitude granted the prosecutor may be somewhat increased where defense counsel has injected extraneous issues into the closing argument.

stances (set forth at note 13, *supra*), as well as "[a]ny other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense." 42 Pa.C.S.A. § 9711(e)(8).

Nevertheless, appellant and amici curiae[24] assert that the Sentencing Code falls short of the constitutional mark in several aspects. Preliminarily, we must reiterate that perfection is not required, *nor is it possible*—there is no perfect procedure for deciding in which cases governmental authority should be used to impose a sentence of death. *Lockett v. Ohio*, *supra* at 605, 98 S.Ct. at 2965. The requirement that the jury must be allowed to consider "whatever mitigating evidence relevant to his character and evidence the defendant can present," *Commonwealth v. Moody*, *supra* 476 Pa. at 237, 382 A.2d at 449, mandates that a certain amount of flexibility be built into any capital punishment sentencing structure, and moreover, virtually assures some "imperfection" in sentencing. Yet this *requisite* degree of flexibility is compatible with the federal and state constitutions if procedures exist which serve to focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the offender, thus channeling the jury's discretion in order to ensure that, with the assistance of appellate scrutiny, the death sentence has not been imposed in an arbitrary and capricious manner. *Gregg v. Georgia*, *supra* 428 U.S. at 206–07, 96 S.Ct. at 2940–2941 (Stewart, J., Opinion announcing the judgment of the Court); *Lockett v. Ohio*, *supra* 438 U.S. at 601, 98 S.Ct. at 2963 (it is not required that all sentencing discretion be eliminated, but only that it be directed and limited so that the death penalty will be imposed in a more consistent and rational manner and so that there will exist a meaningful basis for distinguishing the cases in which it is imposed from those in which it is not.)

Furthermore, in assessing the validity of the Sentencing Code we must remain mindful of another extremely important consideration, namely that:

> it is the *legislature* which has adopted the death penalty as a possible sentence for murder of the first degree in Pennsylvania. In considering such an emotionally charged, controversial and polarizing issue such as the death penalty, the legislature is peculiarly well-adapted to respond to the consensus of the people of this Commonwealth. Regardless of the personal beliefs of any member of this Court, it is manifestly not our function or prerogative to perform as a super-legislature and disturb the determination of the General Assembly absent a demonstration that the legislative enactment "*clearly, palpably* and *plainly* violates" some specific mandate or prohibition of the constitution. *Snider v. Thornburgh*, 496 Pa. 159 at 166, 436 A.2d 593 at 596 (1981), citing *Tosto v. Pennsylvania Nursing Home Loan Agency*, 460 Pa. 1, 331 A.2d 198 (1975).

In *Snider v. Thornburg*, *supra*, this Court identified "what is perhaps the most fundamental principle of statutory construction: the presumption that the legislature has acted constitutionally. This presumption 'reflects on the part of the judiciary the respect due to the legislature as a co-equal branch of the government.' *School District of Deer Lakes v. Kane*, 463 Pa. 554, 562, 345 A.2d 658, 662 (1971)." 496 Pa. at 159, 436 A.2d at 596.

So too, in *Gregg v. Georgia*, *supra* 428 U.S. at 174–76, 96 S.Ct. at 2925–26, the United States Supreme Court instructed:

> But, while we have an obligation to insure that constitutional bounds are not overreached, we may not act as judges as we might as legislators.
>
> "Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their

24. Participating in briefing and oral arguments are, in favor of constitutionality, the Attorney General of Pennsylvania, Leroy S. Zimmerman, and the Pennsylvania District Attorneys Association; opposed to a finding of constitutionality are the NAACP Legal Defense and Educational Fund, Inc., and the ACLU of Greater Philadelphia, with the ACLU Foundation.

judgment is best informed, and therefore most dependable, within narrow limits. The essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures." *Dennis v. United States*, 341 U.S. 494, 525, 71 S.Ct. 857, 875, 95 L.Ed. 1137 (1951) (Frankfurter, J., concurring in affirmance of judgment).

Therefore, in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.

This is true in part because the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards. "[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." *Furman v. Georgia*, *supra*, 408 U.S., at 383, 92 S.Ct., at 2800 (Burger, C.J., dissenting).

Accordingly, this Court is constrained from interference with the legislative judgment that the crime of murder of the first degree, coupled with specific aggravating circumstances, is a heinous enough act to warrant imposition of the death penalty under carefully drafted sentencing procedures, unless appellant can meet his heavy burden of demonstrating t unconstitutionality of 18 Pa.C.S.A. § 13 [transferred to 42 Pa.C.S.A. § 9711: s note 11, *supra*] in some particular. *Commonwealth v. Story*, *supra* 497 Pa. 2 at 297–98, 440 A.2d 488 at 500–01 (Larse J., dissenting, joined by Flaherty ar Kauffman, JJ.) With these principles guide us, we proceed to the specific alleg tions of unconstitutionality.

[26] Appellant and amici argue vigo ously that the statutory provisions for ap pellate review are inadequate to ensur that the jury's discretion has been chan nelled so as to prevent the arbitrary an capricious imposition of the death penalty We cannot accept this proposition.

[27] It is certain that the United State Supreme Court considers meaningful appel late review by a court having statewid jurisdiction to be at least a very importan factor (perhaps a *sine qua non*) in a consti tutionally permissible legislative scheme fo imposition of the death penalty, becaus such review is, in effect, a "last line o defense" to guard against arbitrary sen tencing by a jury.[35] However, the United States Supreme Court has also made it clear that no *particular* mechanism of ap pellate review is required, and has never struck down a state's capital punishment scheme on the basis that the review by the state appellate courts was inadequate, choosing to assume, in the absence of evidence to the contrary, that the state courts would properly fulfill their obligations to ensure against arbitrary and capricious imposition of the death penalty.

It is true, as appellant and amici point out, that the elaborate administrative procedures provided by statute in Georgia to facilitate and expedite appellate review by the Supreme Court of Georgia[36] were well

25. *See, e.g., Gregg v. Georgia*, *supra* 428 U.S. at 198, 204–06, 96 S.Ct. at 2936, 2939–2940 (opinion by Stewart, J. announcing the judgment of the Court) and at 211 (concurring opinion by White, J.), *Proffitt v. Florida*, *supra* 428 U.S. at 251, 253, 258–59, 96 S.Ct. at 2966, 2967, 2969–2970 (opinion by Stewart, J., announcing the judgment of the Court), *Jurek v. Texas*, *supra* 428 U.S. at 276, 96 S.Ct. at 2958 (opinion by Stewart, J., announcing the judgment of the Court).

36. These procedures include the requirements that the trial judge fill out a 6½ page questionnaire concerning the trial and sentencing pro-

received by the United States Supreme Court in *Gregg v. Georgia, supra*. The suggestion that such mechanisms are constitutionally required, however, flies in the face of the latter Court's explicit pronouncement in *Proffitt v. Florida, supra*.

In *Proffitt*, the petitioner had asserted that the rather general provision for appellate review under the Florida statute was subjective and unpredictable, and therefore unconstitutional. The statute, Fla.Stat. Ann. § 921.141 Crim.Proc. & Corrections, provides only that the judgment of conviction and sentence of death shall be subject to automatic and expedited review by the Supreme Court of Florida. While the statute did not so provide, the Florida high court nevertheless undertook the task of reviewing each death sentence to ensure that similar results were reached in similar cases. *State v. Dixon*, 283 So.2d 1, 10 (Fla. Sup.Ct.1973). The United States Supreme Court rejected petitioner's argument, holding:

> While it may be true that [the Florida Supreme Court] has not chosen to formulate a rigid objective test as its standard of review for all cases, it does not follow that the appellate review process is ineffective or arbitrary. In fact, it is apparent that the Florida court has undertaken responsibly to perform its function of death sentence review with a maximum of rationality and consistency. For example, it has several times compared the circumstances of a case under review with those of previous cases in which it has assessed the imposition of death sentences. *See, e.g., Alford v. State*, 307 So.2d, [433] at 445; *Alvord v. State*, 322 So.2d, [533] at 540-541. By following this procedure the Florida court has in effect adopted the type of proportionality review mandated by the Georgia statute.

Proffitt v. Florida, supra 428 U.S. at 258-59, 96 S.Ct. at 2969-2970. And, in *Jurek v. Texas, supra* 428 U.S. at 276, 96 S.Ct. at 2958 the Court stated: "By providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the even-handed, rational and consistent imposition of death sentences under law." (Opinion by Stewart, J., announcing the judgment of the Court). Texas merely provided, as did Florida, that the Texas Court of Criminal Appeals shall automatically and expeditiously review the conviction and sentence of death, Tex.Code Crim.Proc. Art. 37.-071(f), and provided no substantive guidelines nor procedural mechanisms for appellate review. The United States Supreme Court presumed that the Texas court would adequately perform its statutory and constitutional obligations. *Id.* at 279, 96 S.Ct. at 2959 (White, J., concurring).

[28] From the foregoing, it is clear that so long as an appellate court of statewide jurisdiction will conduct a meaningful review of a sentence of death to guard against its arbitrary and capricious imposition, the United States Supreme Court will not interfere with the state's choice of appellate and administrative mechanisms. This Court does not treat lightly its statutory and constitutional duties and will conduct an independent evaluation of all cases decided since the effective date of the sentencing procedures under consideration (September 13, 1978). This independent review mandated by 42 Pa.C.S.A. § 9711(h)(3)(iii) will utilize all available judicial resources and will encompass all similar cases, taking into consideration both the circumstances of the crime and the character and record of the defendant in order to determine whether the sentence of death is excessive or disproportionate to the circumstances.

[29] Our review indicates that, as would be expected with an aggravating circumstance as specific as § 9711(d)(5), the first degree murder cases involving the killing of a prosecution witness to a murder or other

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ceedings, that the Georgia Supreme Court will compare similar cases for excessiveness or disproportionality and list the similar cases in its opinion, and the creation of a special administrator attached to that Court to compile and preserve data on all capital punishment cases.

felony are infrequent. The only case that our research indicates has proceeded to a jury verdict under § 9711(d)(5) of the Act of September 13, 1978, has also resulted in a sentence of death.[36a] We find, therefore, that in Pennsylvania, the sentence of death for murder of the first degree involving the aggravating circumstance of killing a prosecution witness to a murder or other felony is not "excessive or disproportionate to the sentence imposed in similar cases."

[30] Appellant makes a related argument that, because the jury is not required to indicate, in writing or otherwise, the mitigating circumstances that it finds to exist, this Court will not be able to properly perform its appellate duties. Such argument assumes that this Court is not able to review the record of the trial and sentencing proceedings, which is assuredly not the case. We have reviewed in this case, as we will in the future, the entire record and will evaluate "similar cases" on the basis of the evidence presented as to mitigating circumstances. Thus, the lower court did not abuse its discretion in refusing defense counsel's request to poll the jury as to which mitigating circumstances it found.

It is next argued that section 9711 of the Sentencing Code improperly allocates the burden of proof by placing the risk of nonpersuasion on the defendant, who is required to convince the jury that mitigating circumstances exist by a preponderance of the evidence. Subsection (c)(iii) provides that aggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt and that mitigating circumstances be proved by the defendant by a preponderance. Appellant and amici suggest that this allocation violates the due process protections of the Fifth and Fourteenth Amendments to the United States Constitution which protect "the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970). This suggestion is unfounded, as is made evident by *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977), a case which is conspicuous by its absence from the briefs of appellant or amici.

In *Patterson*, the United States Supreme Court held it proper to place, even at the guilt stage, the burden of proving an affirmative defense upon a defendant (specifically in that case, the defense of "extreme emotional disturbance"). That Court held, at 205–06, 97 S.Ct. at 2324–2325:

> We cannot conclude that Patterson's conviction under the New York law deprived him of due process of law. The crime of murder is defined by the statute, which represents a recent revision of the state criminal code, as causing the death of another person with intent to do so. The death, the intent to kill, and causation are the facts that the State is required to prove beyond a reasonable doubt if a person is to be convicted of murder. No further facts are either presumed or inferred in order to constitute the crime. The statute does provide an affirmative defense—that the defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation—which, if proved by a preponderance of the evidence, would reduce the crime to manslaughter, an offense defined in a separate section of the statute. It is plain enough that if the intentional killing is shown, the State intends to deal with the defendant as a murderer unless he demonstrates the mitigating circumstances.

36a. The case is *Commonwealth v. Mack Trucksale*, Philadelphia County Court of Common Pleas, Criminal Division 7607—135–136, docketed on appeal with this Court, 81–3–483. In this case, the defendant was convicted of murder of the first degree for the killing of a person who had witnessed the murder of another victim during a drug transaction. The jury found three aggravating circumstances, including § 9711(d)(5), killing of a prosecution witness' a murder, (the others were § 9711(d)(7, 10)), no mitigating circumstances, and returned a sentence of death.

Here, the jury was instructed in accordance with the statute, and the guilty verdict confirms that the State successfully carried its burden of proving the facts of the crime beyond a reasonable doubt. Nothing in the evidence, including any evidence that might have been offered with respect to Patterson's mental state at the time of the crime, raised a reasonable doubt about his guilt as a murderer; and clearly the evidence failed to convince the jury that Patterson's affirmative defense had been made out. It seems to us that the State satisfied the mandate of *Winship* that it prove beyond a reasonable doubt "every fact necessary to constitute the crime with which [Patterson was] charged." 397 U.S., at 364, 90 S.Ct., at 1073.

Other decisions of that Court, and of this, have expressed approval of legislative schemes placing the burden of proving mitigating circumstances on a defendant. *See Proffitt v. Florida, supra and Commonwealth v. Moody*, 476 Pa. at 237, 382 A.2d at 449 ("[I]n our view, in order to protect a defendant from cruel and unusual punishment in a capital case, it is now necessary both that the aggravating circumstances that will justify the imposition of the death penalty be clearly defined . . . and that the sentencing authority be allowed to consider whatever mitigating evidence relevant to his character and record *the defendant can present.*")

[31] Under 42 Pa.C.S.A. § 9711(c), the Commonwealth, by proving guilt beyond a reasonable doubt of murder of the first degree and of the existence of one or more aggravating circumstances, has demonstrated all that is constitutionally required of it. In meeting this burden, the Commonwealth must prove every element necessary to establish murder of the first degree and every element necessary to establish one or more aggravating circumstance which the legislature has determined is of a sufficiently heinous nature as to require imposition of the death penalty. The accused is then given the opportunity to prove, by a preponderance of the evidence, that there are mitigating circumstances that might convince a jury that the sentence should nevertheless be set at life imprisonment. Such an allocation is not offensive to due process.

[32] It is further contended that the Sentencing Code is unconstitutional because it supplies no fixed burden of proof as to the weighing of aggravating circumstances against mitigating circumstances, and that the standards are, therefore, impermissibly vague. Appellant and amici would have us invalidate this procedure because the Sentencing Code fails to instruct the jury that the aggravating circumstances must outweigh the mitigating circumstances "beyond a reasonable doubt" or, alternatively, by some lesser articulated standard which would inform the jury as to what extent the aggravating circumstances must outweigh the mitigating. For the reasons stated in the preceding section regarding allocations of burdens of proof, we are not persuaded by this contention.

The jury is simply asked to determine whether aggravating circumstances *outweigh* mitigating. 42 Pa.C.S.A. § 9711(c)(iv). Such a standard is not vague. Appellant would prefer a stricter weighing standard but, as we have seen, the Commonwealth has the burden of proving beyond a reasonable doubt *every* element of the offense and of the aggravating circumstances required to sustain a death sentence, and this Court is not at liberty to tamper with the constitutionally permissible legislative judgment regarding that weighing process. The United States Supreme Court rejected a similar contention in *Proffitt v. Florida, supra* 428 U.S. at 257–58, 96 S.Ct. at 2968–2969:

> In a similar vein the petitioner argues that it is not possible to make a rational determination whether there are "sufficient" aggravating circumstances that are not outweighed by the mitigating circumstances, since the state law assigns no specific weight to any of the various circumstances to be considered. See § 921.-141 (Supp.1976–1977).

While these questions and decisions may be hard, they require no more line drawing than is commonly required of a factfinder in a lawsuit. For example, juries have traditionally evaluated the validity of defenses such as insanity or reduced capacity, both of which involve the same considerations as some of the above-mentioned mitigating circumstances. While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of *Furman* are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.

The directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed.

[33] Amici, NAACP, argues that another facet of Pennsylvania criminal jurisprudence, namely the practice of instructing the jury in a homicide trial on the elements of the offense of voluntary manslaughter, upon request, whether or not evidence exists to support such a charge, *see e.g., Commonwealth v. Jones*, 457 Pa. 563, 319 A.2d 142 (1974), *cert. denied* 419 U.S. 100, 95 S.Ct. 316, 42 L.Ed.2d 274 (1974) *and Commonwealth v. Harris*, 472 Pa. 406, 372 A.2d 757 (1977), invites the jury to disregard their oaths to apply the law to the evidence and, therefore, encourages arbitrary and capricious sentencing in homicide cases in violation of the Eighth and Fourteenth Amendments as interpreted in *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976), one of the 1976 quintet of death penalty cases.[27] (In the instant case, no request for voluntary manslaughter instructions were made, as such instructions would have been incompatible with the defense offered, since it admitted liability for either murder of the first or murder of the third degree). The evil addressed in *Furman* and in *Bradley* was that the death penalty practices and procedures then in effect failed to adequately channel a jury's discretion and, thus, allowed for arbitrary and capricious sentences of death which failed to reveal why the death penalty was imposed in some (few) cases but not in other, similar, instances.

Amici relies on *Roberts* to support its proposition that the Pennsylvania practice on voluntary manslaughter instructions continues to invite jury arbitrariness in sentencing despite the elaborate provisions of 42 Pa.C.S.A. § 9711. In *Roberts*, the United States Supreme Court considered Louisiana's "unique system of responsive verdicts", *supra* at 332, 96 S.Ct. at 3005, wherein the jury, in every first-degree murder case, is instructed on the crimes of first-degree murder, second-degree murder, and manslaughter, whether or not there is any evidence adduced at trial to support a verdict of voluntary manslaughter, and held:

> Louisiana's mandatory death sentence statute also fails to comply with *Furman's* requirement that standardless jury discretion be replaced by procedures that safeguard against the arbitrary and capricious imposition of death sentences. The State claims that it has adopted satisfactory procedures by taking all sentencing authority from juries in capital murder cases. This was accomplished, according to the State, by deleting the jury's pre-*Furman* authority to return a verdict of guilty without capital punishment in any murder case. See La.Rev.Stat.Ann. § 14:30 (1974); La.Code Crim.Proc.Ann., Arts. 814, 817 (Supp.1975).

27. For the reasons expressed in note 19, *supra*, we will address the merits of this contention despite the failure of appellant to raise and preserve the issue.

Under the current Louisiana system, owever, every jury in a first-degree murder case is instructed on the crimes of econd-degree murder and manslaughter nd permitted to consider those verdicts *ven if there is not a scintilla of evidence o support the lesser verdicts.* See La. Code Crim.Proc.Ann., Arts. 809, 814 Supp.1975).

And, if a lesser verdict is returned, it is treated as an acquittal of all greater charges. See La.Code Crim.Proc.Ann., Art. 598 (Supp.1975). This responsive verdict procedure not only lacks standards to guide the jury in selecting among first-degree murderers, but *it plainly invites the jurors to disregard their oaths and choose a verdict for a lesser offense whenever they feel the death penalty is inappropriate.* There is an element of capriciousness in making the jurors' power to avoid the death penalty dependent on their willingness to accept this invitation to disregard the trial judge's instructions. The Louisiana procedure neither provides standards to channel jury judgments nor permits review to check the arbitrary exercise of the capital jury's *de facto* sentencing discretion. See *Woodson v. North Carolina*, 428 U.S., [280] at 302–303, 96 S.Ct., [2978] at 2990–2991.

d. 428 U.S. at 334–35, 96 S.Ct. at 3006–007. It seems that the Court was influnced in its decision by a combination of actors: the mandatory verdict of death for irst-degree murder, the unfettered discreion of the jury to return a lesser offense, oupled with the facts that, in Louisiana, "there are no standards provided to guide the jury in the exercise of its power to select those first-degree murderers who will receive death sentences, and there is no meaningful appellate review of the jury's decision." *Id.* at 335–36, 96 S.Ct. at 3007.

Mr. Justice White dissented in *Roberts*, joined by the Chief Justice, Mr. Justice Blackmun and Mr. Justice Rehnquist. The dissenters would have found the Louisiana responsive verdict system valid because the jury was not instructed that it could *in its discretion* convict of a lesser included offense. Rather, they were simply given the various instructions so that, if they did not believe beyond a reasonable doubt that the defendant was guilty of first degree murder, they were free to consider the lesser verdicts. *Id.* at 347, 96 S.Ct. at 3012.

That the *combination* of factors—mandatory death sentences for first degree murder, charging on lesser included offenses, lack of sentencing standards/guidelines, and lack of meaningful appellate review—produced the unconstitutional result in Louisiana is apparent from the companion cases of *Gregg v. Georgia*, *supra*, *Proffitt v. Florida*, *supra*, and *Jurek v. Texas*, *supra*. In each of those cases, the petitioners had argued that discretionary aspects of the states' criminal justice system, including prosecutorial discretion in charging, plea bargaining, executive clemency and the practice of enarging the jury on lesser included offenses, presented the potential evil of arbitrary and capricious decision-making which was condemned in *Furman* and *Bradley*. As Mr. Justice White stated, such a contention "seems to be in the final analysis an indictment of our entire system of justice", *Gregg v. Georgia*, *supra* 428 U.S. at 225–26, 96 S.Ct. at 2949–2950 (White, J., concurring, joined by the Chief Justice and Rehnquist, J.), and was unacceptable. *Id.* The opinion of Mr. Justice Stewart stated:

> First, the petitioner focuses on the opportunities for discretionary action that are inherent in the processing of any murder case under Georgia law. He notes that the state prosecutor has unfettered authority to select those persons whom he wishes to prosecute for a capital offense and to plea bargain with them. Further, at the trial the jury may choose to convict a defendant of a lesser included offense rather than find him guilty of a crime punishable by death, even if the evidence would support a capital verdict. And finally, a defendant who is convicted and sentenced to die may have his sentence commuted by the Governor of the State and the Georgia Board of Pardons and Paroles.

The existence of these discretionary stages is not determinative of the issues before us. At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. *Furman*, in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense. Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. *Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.

Id. 428 U.S. at 199, 96 S.Ct. at 2937. (Opinion of Stewart, J., announcing the judgment of the Court, joined by Powell and Stevens, JJ.)

The sentencing procedures in Pennsylvania more closely approximate the Georgia, Florida and Texas procedures than those of Louisiana. Juries in Pennsylvania are not mandated to impose the death penalty in all cases of murder of the first degree, and are not left without guidelines in the determination of whether to impose death or life imprisonment. Perhaps the most significant difference between this Commonwealth and Louisiana is this state's provisions for meaningful appellate review for excessiveness and disproportionality in similar cases.

In the instant proceeding, our review of similar cases does not encompass those cases where a defendant requested, or might have requested, a charge on voluntary manslaughter. Appellant herein admitted criminal liability for either murder of the first or murder of the third degree. His defense specifically eschewed any possibility of an instruction on any lesser offense. It would be inappropriate, therefore, to include cases in the comparison wherein the jury was instructed on voluntary manslaughter in the absence of evidence to support such verdict. Accordingly, we need not decide whether, in an appropriate case, the Pennsylvania practice (of charging the jury on voluntary manslaughter, upon request, where there is no evidence to support such a verdict) leads to arbitrary and capricious results, or presents a substantial possibility of arbitrariness.

Recent decisions of this Court have indicated an erosion of the rule expressed in *Commonwealth v. Jones*, *supra*, *see, e.g.*, *Commonwealth v. Manning*, 477 Pa. 495, 384 A.2d 1197 (1978) (dissenting opinion by Nix, J., author of opinion in support of affirmance in *Jones*), and a recognition, although belated, that permitting the jury to consider a verdict where no evidence exists to support it invites arbitrariness. *Id.*, *and see Commonwealth v. Milton*, 491 Pa. 614, 421 A.2d 1054 (1980). It is indeed ironic that the *Jones* rule (on voluntary manslaughter instructions) is now alleged to create a possibility of arbitrariness, since the rule was adopted, in large part, because of a perceived potential for arbitrariness in reposing in the trial judge the discretion whether to so charge. *See Commonwealth v. Jones*, 457 Pa. at 578, 319 A.2d 142 (Roberts, J., opinion in support of affirmance: "[b]ecause the choice whether or not to charge [on voluntary manslaughter] is discretionary with the trial judge, and he has been furnished with no objective standards for his guidance, the challenged practice offends due process....").

Contrary to the opinions of two Justices, *Commonwealth v. Schaller*, 493 Pa. 426, 435 n. 11, 426 A.2d 1090 (1981), the *Jones* rule is *clearly* not required by the Constitution. In *Schaller*, the opinion announcing the result of the Court viewed *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) as requiring a charge on voluntary manslaughter in all cases despite the nature of the evidence. This viewpoint was laid to rest by *Hopper v. Evans*, — U.S. —, 102 S.Ct. 2049, 72 L.Ed.2d 367 (1982) where-

the United States Supreme Court stated: "The Court of Appeals misread our opinion in *Beck*. ... [D]ue process requires that a lesser included offense instruction be given only when the evidence warrants such an instruction. The jury's discretion is thus unchannelled so that it may convict a defendant of any crime fairly supported by the evidence." At ——, 102 S.Ct at 2053. The Court in *Hopper* further, contrasted *Roberts v. Louisiana*, *supra* interpreting that case as "suggest[ing] that an instruction on a lesser offense ... would have been impermissible absent evidence supporting a conviction of a lesser offense." *Id.* Thus, any lingering notion that the *Jones* rule had constitutional underpinnings has been finally dispelled. *See Commonwealth v. Jones*, *supra* (opinion by Nix, J., in support of affirmance, premising the rule on this Court's supervisory powers).

In a related development, this Court has rejected the practice of charging the jury, on request, on the crime of involuntary manslaughter without regard to the evidence, holding that "charging the jury on extraneous offenses in homicide trials would be inapposite and detrimental to the sound administration of justice." *Commonwealth v. White*, 490 Pa. 179, 184, 415 A.2d 399, 401 (1980), *and Commonwealth v. Williams*, 490 Pa. 187, 415 A.2d 403 (1980). In an appropriate case, this Court would have to consider whether *Roberts v. Louisiana*, *supra*, would require a similar result regarding instructions on voluntary manslaughter in the absence of evidence to support such an offense.

[34, 35] Finally, appellant and amici argue that the imposition of the death penalty is inevitably "cruel punishment" under Article I, § 13 of the Pennsylvania Constitution which provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishment inflicted." The argument that capital punishment inevitably violates the prohibition of the Eighth Amendment against "cruel and unusual" punishments has, of course, been foreclosed by the United States Supreme Court. *See Gregg v. Georgia*, *supra* 428 U.S. at 169, 187, 96 S.Ct. at 2923, 2931. It is requested, however, that this Court interpret Art. I, § 13 as providing broader protection than that guaranteed by the "cruel and unusual punishment" clause of the United States Constitution. We decline the invitation, and hold that the rights secured by the Pennsylvania prohibition against "cruel punishments" are co-extensive with those secured by the Eighth and Fourteenth Amendments.

It is undisputed that the framers of the United States Constitution did not consider the death penalty to be a *per se* violation of the prohibition against "cruel punishments". *See Gregg v. Georgia*, *supra* at 177, 96 S.Ct. at 2927.[28] Neither did the framers of the Pennsylvania Constitution. Article I, § 9 enacted simultaneously with Art. I, § 13, provides "nor can [the accused in a criminal prosecution] be deprived of his life, liberty, or property, unless by the judgment of his peers or the law of the land." Similarly, Art. I, § 10 provides "[n]o person shall, for the same offense, be twice put in jeopardy of life or limb ...".

We accept the principle enunciated by the United States Supreme Court that the intention of the framers is not the end point of our analysis, for the Pennsylvania prohibition against "cruel punishment", like its federal counterpart against "cruel and un-

28. Announcing the result of the Court, Mr. Justice Stewart stated:

"It is apparent from the text of the Constitution itself that the existence of capital punishment was accepted by the Framers.... The Fifth Amendment, adopted at the same time as the Eighth, contemplated the continued existence of the capital sanction by imposing certain limits on the prosecution of capital cases:

"No person shall be ... deprived of life, liberty, or property, without due process of law ...."

And the Fourteenth Amendment, adopted over three/quarters of a century later, similarly contemplates the existence of the capital sanction...."

usual punishment", is not a "static concept. As Mr. Chief Justice Warren said, in an oft-quoted phrase, '[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'" *Gregg v. Georgia*, *supra* at 173, 96 S.Ct. at 2925, *quoting Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed.2d 630 (1958) (plurality opinion). We believe that the most accurate indicators of those "evolving standards of decency" are the enactments of the elected representatives of the people in the legislature. What was stated earlier bears repeating at this juncture: "In considering such an emotionally charged, controversial and polarizing issue such as the death penalty, the legislature is peculiarly well-adapted to respond to the consensus of the people of this Commonwealth." *Commonwealth v. Story*, *supra* 497 Pa. at 297, 440 A.2d at 500 (Larsen, J., dissenting). "[T]he constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards. "[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." *Gregg v. Georgia*, *supra* 428 U.S. at 175–76, 96 S.Ct. at 2926–2927, *quoting Furman v. Georgia*, *supra*, 408 U.S. at 383, 92 S.Ct. at 2800.

The General Assembly of this Commonwealth has, since its inception, consistently and continually expressed its conviction that the death penalty is, for at least some intentional killings, an appropriate and necessary form of punishment. When the charter was granted William Penn by Charles II in 1861, Penn quickly exercised the privilege granted thereunder to enact laws, and passed statutes in 1682 and 1683 prescribing penalties less than death for all offenses *except* willful or premeditated murder.[29] (Prior to that time, the death penalty was a permissible punishment for a variety of felonies). Even under the so-called "humane laws" of William Penn, therefore, capital punishment was accepted as a necessary and appropriate punishment for willful and premeditated killings. Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U.Pa.L. Rev. 759, 763 (1949) (hereinafter cited as "Keedy"). Immediately upon Penn's death in 1718, the Provincial Assembly repealed these "humane laws" and prescribed the death penalty for, *inter alia*, sodomy, buggery, rape, highway robbery, witchcraft and enchantment. These and other subsequently added offenses, continued to be classified as capital until near the end of the century. *Id.* at 763–64.

In 1794, the General Assembly approved an act, the first of its kind among the states, creating degrees of murder with the death penalty confined to murder of the first degree encompassing all willful, deliberate and premeditated killings *Keedy*, *supra* at 772–73; *Woodson v. North Carolina*, *supra* 428 U.S. at 290, 96 S.Ct. at 2984.[30]

From that time until the present, this Commonwealth has always operated under some legislative enactment setting the penalty for at least some first degree murders at death, except for brief periods caused by decisions of this Court in *Commonwealth v. Bradley*, *supra*, *Commonwealth v. Moody*, *supra*, and *Commonwealth v. McKenna*, *supra*. The legislature has always acted promptly to fill the gaps caused by those decisions. *See Commonwealth v. McKenna*, *supra* 476 Pa. at 435, 383 A.2d 174.

Moreover, the legislatures of 34 other states were quick to act in response to *Furman*, and have also concluded that capital punishment is appropriate for at least some crimes that result in the death of another person. *Gregg v. Georgia*, *supra*,

29. This was the Great Law of William Penn. *Woodson v. North Carolina*, *supra* 428 U.S. at 290, n. 19, 96 S.Ct. at 2984, n. 19, *citing* Hartung, *Trends in the Use of Capital Punishment*, 284 Annals of Am.Academy of Pol. and Soc.Sci. at 9–10 (1952).

30. Following Pennsylvania's lead, many jurisdictions soon followed suit. *Woodson v. North Carolina*, *supra* 428 U.S. at 290, 96 S.Ct. at 2984.

U.S. at 179, 96 S.Ct. at 2928. Combining present acceptance with past usage, *Gregg v. Dulles, supra* 356 U.S. at 99, 78 S.Ct. 597, opined "the death penalty has been preserved throughout our history, and, in a case when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty."

The finding that the death penalty is not per se "cruel punishment" under Article I, § 13 is implicit in many of our prior decisions. *See, e.g., Commonwealth v. Green,* 396 Pa. 137, 151 A.2d 241 (1959) (death penalty not cruel and unusual punishment under either state or federal constitutions to apply because applied to 15 year old defendant, although sentence reduced because lower court failed to consider particularized factors relating to the individual, *not* "from mere disinclination against capital punishment") and *Commonwealth v. Howard,* 426 Pa. 305, 231 A.2d 860 (1967) (death penalty not cruel and unusual punishment under either state or federal constitutions merely because defendant had been classified as "mentally ill" with borderline or transient psychosis).[31]

For the foregoing reasons, we hold that the death penalty is not "cruel punishment" within the proscription of Art. I, § 13 of the Pennsylvania Constitution, and, further, that the sentencing procedures adopted by the General Assembly and set forth at section 9711 of the Sentencing Code, 42 Pa.C.S.A. § 9711, are permissible under the Constitutions of this state and of the United States. Accordingly, we sustain the conviction of murder of the first degree and affirm the sentence of death.[32]

It is so ordered.

ROBERTS, J., files a dissenting opinion in which O'BRIEN, C.J., joins.

NIX, J., files a dissenting opinion.

ROBERTS, Justice, dissenting.

Although I agree that the jury's verdict of guilty of murder of the first degree should not be disturbed, I do not agree that the judgment of sentence of death is properly affirmed. On this record it cannot be concluded that the Commonwealth has borne its burden of proving, beyond a reasonable doubt, the presence of an aggravating circumstance which would permit the imposition of the death penalty pursuant to 42 Pa.C.S. § 9711(d). Moreover, appellant has not had the opportunity to develop claims challenging the effective assistance of trial counsel, an opportunity afforded through the Post-Conviction Hearing Act to all defendants who receive judgments of sentence other than the death penalty.

I

Appellant was twenty-five years of age at the time of sentencing. The parties agreed that at least one mitigating circumstance was present in this case; that the defendant had no significant history of prior criminal convictions. See 42 Pa.C.S. § 9711(e)(1). Of the ten aggravating circumstances defined by the Legislature, only one was alleged by the Commonwealth to be present:

> "The victim was a prosecution witness *to a murder or other felony* committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceeding involving such offenses."

42 Pa.C.S. § 9711(d)(5) (emphasis supplied). On this record it is clear that there is insuf-

31. We will not hesitate, however, to strike down the death penalty where it is grossly out of proportion to the severity of the crime or where it is nothing more than purposeless and needless imposition of pain and suffering. *Gregg v. Georgia, supra* 428 U.S. at 183 and 187-88, 96 S.Ct. at 2929 and 2931-2932; *Coker v. Georgia,* 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (sentence of death is grossly disproportionate and excessive punishment for rape not involving taking of life.)

32. The prothonotary of the Middle District is directed to transmit, as soon as possible, the full and complete record of the trial, sentencing hearing, imposition of sentence and review by this Court to the Governor. 42 Pa.C.S.A. § 9711(i).

ficient evidence to establish all necessary elements of this statutorily-defined aggravating circumstance. The Commonwealth's evidence showed only that the victim's name had been read from a list of Commonwealth witnesses at the jury-selection stage of the trial of appellant on felony charges. The Commonwealth presented no evidence as to the nature of the victim's proposed testimony at the felony trial from which the jury could conclude that the victim was "a prosecution witness to a murder or other felony committed by the defendant ...."

Under the majority's reading of section 9711(d)(5), the killing of *any* prosecution witness constitutes an aggravating circumstance so long as the witness was killed by the defendant in order to prevent the witness's testimony against the defendant in a felony case. This reading gives effect only to that portion of section 9711(d)(5) requiring the Commonwealth to establish motive; of the remainder of section 9711(d)(5), which requires the victim to have been a "prosecution witness to a murder or other felony," all but the word "prosecution" has been rendered mere surplusage by the majority.

The majority's determination that section 9711(d)(5) imposes no burden upon the Commonwealth to establish that the victim would have presented eyewitness testimony does not support the majority's conclusion that the killing of *any* prosecution witness constitutes an aggravating circumstance under section 9711(d)(5). Under the majority's reading of section 9711(d)(5), the killing of an expert witness or a witness who provides only a foundation for other testimony would be within the scope of section 9711(d)(5) even though the plain language of section 9711(d)(5) requires that the victim be a "witness to a murder or other felony committed by the defendant." This statutory requirement, easily met in much the same manner as an offer of proof, may not properly be disregarded.

If the Commonwealth had presented evidence which tended to show that the victim would have provided the Commonwealth with a compelling case of circumstantial evidence of appellant's guilt on the felony charges, this Court would be squarely presented with the question of whether the Legislature intended that section 9711(d)(5) should be limited to the killing of eyewitnesses. Where, however, as here, the Commonwealth has presented no proof whatsoever regarding the nature of the victim's testimony, it is evident that the elements of section 9711(d)(5) have not been met. The Commonwealth having failed to meet its burden of proving the presence of an aggravating circumstance, the jury's sentence must be set aside, and a life sentence imposed.

II

Appellant is represented by the Public Defender of Dauphin County, the same public defender who represented appellant at trial and at the sentencing hearing. Thus far there has been no inquiry into whether appellant has been accorded his constitutional right to the effective assistance of counsel. A review of the record suggests that counsel's strategy at the sentencing hearing may fairly be questioned: counsel challenged the existence of an aggravating circumstance pursuant to 42 Pa.C.S. § 9711(d)(5) purely on a legal ground, and made no effort to refute the alleged motive for the killing from a factual standpoint.

If this were a conventional case, in which a judgment of sentence other than death were imposed, appellant would be able to challenge the effectiveness of counsel in subsequent proceedings initiated pursuant to the Post-Conviction Hearing Act. Here, the sentence imposed forecloses the availability of those subsequent proceedings. See 42 Pa.C.S. § 9711(i) (record to be transmitted to Governor at close of this Court's review).

Appellant's potential claims of ineffective assistance could conceivably be heard by the federal courts. Yet there is a serious risk that the writs necessary to meaningful federal court review could not be timely

obtained. Alternatively, this Court could independently comb the entire record in search of questionable strategies and proceed to determine whether the strategies meet the standard of effective assistance established by our case law, see *Commonwealth ex rel. Washington v. Maroney*, 427 Pa. 599, 235 A.2d 349 (1967). However, such an approach is essentially a search for "plain and fundamental error," a doctrine abrogated by this Court because of its uneven results and inefficiency. See *Commonwealth v. Clair*, 458 Pa. 418, 326 A.2d 272 (1974); *Dilliplaine v. Lehigh Valley Trust Co.*, 457 Pa. 255, 322 A.2d 114 (1974). Such an approach also overlooks the fact that frequently the reasons for counsel's strategy do not appear of record, and an evidentiary hearing must be held to ascertain the unknown facts.

Here, the need for a hearing on counsel's effectiveness is critical. There are facts of record which would support a theory that the killing was motivated by financial considerations and not by a desire to prevent the victim from testifying; appellant had incurred a substantial amount of debt before he killed the victim, and appellant was in possession of a large amount of cash when taken into police custody soon after the killing. Although it is possible that counsel may have had legitimate reasons not to pursue this or any other alternative motive, it is equally possible that counsel's reasons did not serve to advance the interests of appellant, or that counsel simply overlooked relevant evidence. Without an evidentiary hearing, this Court cannot determine whether counsel's course of conduct was constitutionally effective.

Rather than abdicate responsibility to the federal courts, or purport to engage in a search for error on the basis of an incomplete record, this Court should fashion an appropriate procedure which assures proper inquiry into the effectiveness of counsel in death cases. One such procedure would require the appointment of new counsel prior to the direct appeal from a judgment of sentence of death. Newly appointed counsel would be obliged to gather and to evaluate all facts necessary to the determination of whether trial counsel provided the defendant with effective assistance, and then to submit a petition to the court of common pleas in the nature of a petition for post-conviction relief, confined to the question of whether trial counsel was effective. The court of common pleas would conduct an evidentiary hearing on newly appointed counsel's petition and, after making appropriate findings of fact, enter an order which disposes of the petition.

The present record does not permit a full and fair determination of whether appellant was afforded his constitutional right to the effective assistance of trial counsel. Until a hearing on counsel's effectiveness has been held, this Court cannot fairly state that it has discharged its statutory duty to provide a thorough review of the judgment of sentence of death.

O'BRIEN, C.J., joins in this dissenting opinion.

NIX, Justice, dissenting.

I am satisfied that the sanction of capital punishment is not prohibited either by the federal or our state constitution. I am also convinced that this sanction does provide a significant deterrent effect for those who would consider the perpetration of a deliberate and premeditated murder, even in the absence of a capability to accumulate statistical data in support of this position. Nevertheless, the utilization of this sanction imposes upon the judicial system the responsibility to scrupulously oversee its use and to avoid arbitrary, discriminatory or capricious application. Paramount is the obligation to insure the fairness of the proceeding.

I cannot agree with the majority in its affirmance of the judgment of sentence of death because (1) the statutory standard determining the sentence to be imposed has as yet to be clearly defined and (2) the instructions given by the trial court on this subject were ambiguous and confusing.

The statute has provided that where the jury finds the existence of both aggravating and mitigating factors the sentence of death must be returned if the aggravating circumstances outweigh the mitigating circumstances. 42 Pa.C.S.A. § 9711(c)(iv).[1] The statute has failed to express the standard to be applied in this measurement. The majority implicitly suggests that the scale can be tipped in favor of death by a scintilla of weight. *See* p. 954, n. 18. I cannot accept the legislature intended the decision of life or death to turn on the weight of a feather.

I recognize a statutory deficiency can be cured by the interpretation of the court of last resort, however, the majority in this instance has failed to come to grips with this question and implies an interpretation that I find to be totally unacceptable. Most importantly for the judgment to stand it must be apparent from the face of the record that the fact finder had before it the proper standard. Here, that obviously was not the case.

In addition to the statutory inadequacy, the record reveals that the charge as it related to this subject was at best ambiguous and unclear. At one point the court told the jury if the mitigating circumstances outweigh the aggravating circumstances the jury must bring in a sentence of life imprisonment. N.T. at 36. Later, the court instructed the jury that the death penalty was required if an aggravating circumstance was found to exist beyond a reasonable doubt and there was either no mitigating circumstance or that the aggravating circumstance outweighed any mitigating circumstance. N.T. 39. This later statement, characterized in the majority opinion at p. 954 as curative, is neither corrective nor curative of the earlier erroneous charge. No mention was made of the fact that the mitigating circumstances need not outweigh the aggravating circumstances. In fact a request for such instructions were specifically refused. We have in the past, in non-capital cases, reversed and granted new trials on the basis of inadequate, unclear, misleading or inappropriate charges. *Commonwealth v. Wortham*, 471 Pa. 243, 248, 369 A.2d 1287, 1290 (1977); *Commonwealth v. Goins*, 457 Pa. 394, 321 A.2d 913 (1974); *Commonwealth v. Tiernan*, 455 Pa. 88, 314 A.2d 310 (1974); *Commonwealth v. Taylor*, 453 Pa. 539, 309 A.2d 367 (1973); *Commonwealth v. Mills*, 350 Pa. 478, 39 A.2d 572 (1944).

> At best, the charge is contradictory, assigning first to one party and then to the other the burden of proving its case. Conceding that in several instances the court correctly assessed upon the Commonwealth the burden of proving guilt beyond a reasonable doubt, nevertheless, the incorrect instructions remained unaltered. The possibility of confusion as a result of conflicting directives may not be permitted on such a fundamental issue as the burden of proof. *See Commonwealth v. Ewell*, 456 Pa. 589, 319 A.2d 153 (1974); *Commonwealth v. Ross*, 266 Pa. 580, 110 A. 327 (1920). The function of the charge is to elucidate the relevant legal principles not to obfuscate them.
>
> *Commonwealth v. Wortham*, *supra* 471 Pa. at 247, 369 A.2d at 1289.

Here we are faced with a standard of determining life or death, an even more fundamental issue than that of burden of proof.

And finally, it is clearly our responsibility to examine the record with detached scrutiny. The majority opinion not only fails to meet this responsibility, but in my opinion, cavalierly employs a presumption of the absence of harmful error in justifying the charge of the court below.

Accordingly, I join in the affirmance of the conviction of murder of the first degree and would vacate the sentence of death and impose a sentence of life imprisonment.

1. Although subsection (c)(iv) is ambiguous in that the explicit language states "or if the jury unanimously finds one or more aggravating circumstances which outweigh *any* mitigating circumstances" (Emphasis supplied) it is fair to assume, as the majority properly does, that the word "any" means "all."

NDIX - PART 2

Commonwealth v. Zettlemoyer

Crimes and criminal procedure—Post trial motions—Murder—Warrantless search of vehicle—Mandatory discovery of psychological report—Expert testimony—Diminished capacity—Admission of photograph and medical tests—Voir dire—Constitutionality of death penalty—Sufficiency of evidence.

1. Following defendant's conviction of murder and imposition of the death penalty by the jury, the Court overruled defendant's post-trial motions after finding that no trial errors were committed and that the evidence fully warranted the penalty.

2. Warrantless inventory searches of automobiles are proper provided the Commonwealth proves that (1) the vehicle was lawfully within the custody of the police, and (2) the search was in fact an inventory search.

3. Seizure of items within the "plan view" of officers who are legitimately in a position to obtain that view is permissible.

4. If the Commonwealth files a Motion for Pre-trial Discovery, the Court may order the defendant, subject to the defendant's rights against compulsory self incrimination, to allow the Commonwealth to inspect and copy or photograph results or reports of physical or mental examinations within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief or which were prepared by a witness whom the defendant intends to call, which reports relate to the testimony of that witness, provided the defendant has requested and received discovery, upon a showing of materiality to the preparation of the Commonwealth's case and if the request is reasonable.

5. In evaluating the correctness of instructions to a trial jury, the charge must be read and considered as a whole, and it is the general effect of the charge that controls.

6. Results of chemical tests, done in the ordinary business routine of a hospital, when the doctor had numerous occasions to read the results of such tests and could make a diagnosis or perform treatment based on such results, can be admitted into evidence even though the hospital technician who administered the test is not present at the trial.

7. Questions with respect to a venireman's opinion on psychiatric testimony or concerning a proposed juror's understanding of the law may not be asked on voir dire.

8. The Pennsylvania death penalty statute meets the criteria of the decisions by the Supreme Court since there are sufficient mitigating circumstances.

9. Under the decisions of the Supreme Court and in accordance with the Pennsylvania Sentencing Code it is for the jury to determine whether the aggravating circumstances outweigh the mitigating circumstances to justify the death penalty.

10. Reference to the deterrent effect of the death penalty in the District Attorney's closing is within the reasonable latitude allowed in such argument.

11. Although the prosecution may not refer to facts outside the record in closing argument, facts which are a matter of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice may be referred to.

Murder; post trial motions. C.P., Dau. Co., No. 1818 Criminal Division 1980. Motions denied.

Richard A. Lewis, District Attorney, for the Commonwealth.

Robert N. Tarman, Public Defender, for Defendant.

DOWLING, J., October 16, 1981.—Condemned to death for the murder of Charles DeVetsco, defendant has filed a number of reasons in support of his attempt to avoid execution. The finality of the penalty requires a meticulous review of the proceedings leading to his condemnation.

The facts asserted by the Commonwealth, confirmed by the jury and not contested by the defendant show a carefully planned, brutally carried out, cold-blooded execution of a young man scheduled to testify against the defendant in a pending felony trial.

In the early morning hours of October 13, 1980, two officers of the Conrail Police Department were on routine patrol in the railroad grounds near the Maclay Street Bridge when they heard gunfire coming from a nearby area. Moving to the scene, they observed a van parked on a dirt access road and hearing rustling in the bushes in front of it, ordered whoever it was to come forward. Out stepped Keith Zettlemoyer with a .357 magnum in one hand, flashlight in the other who exclaimed, "I'm shooting rats."

Looking in the area from which the defendant emerged the officers discovered a body of a young man lying face downward with gunshot wounds in the back and neck who, though slightly moving, was dead by the time the ambulance arrived. An autopsy discovered that the victim had been shot twice with a .357 magnum revolver and twice with a .22 caliber weapon. Ballistics established that the murder weapon was the gun in Zettlemoyer's hand as he exited the woods. Although the victim had no personal belongings or identification on him, he was later identified as one Charles DeVetsco, age 30, of Sunbury who was scheduled to be a witness for the Commonwealth in a case involving several felonies charged against the defendant scheduled for trial within the week in Snyder County.

At his trial the defendant conceded general criminal liability. The only defense was that of diminished capacity in an attempt to reduce the killing from first degree to third degree murder.

The jury rejected this contention and not only found Zettlemoyer guilty in the first degree but after hearing evidence on mitigating and aggravating circumstances, fixed the penalty at death.

Defendant's post-trial arguments group them into nine categories which will be dealt with seriatim.

I. THE REFUSAL TO SUPPRESS EVIDENCE FOUND IN A WARRANTLESS SEARCH OF THE VAN

There are well defined and delineated exceptions to the general rule that searches conducted without warrants are unreasonable. E.g., *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *Katz v. United States*, 389 U.S. 347 (1967); *Commonwealth v. Shaffer*, 447 Pa. 91 (1972).

One of these is the "plain view" exception. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Commonwealth v. Adams*, 234 Pa. Super. 475 (1975). Another is the inventory search first recognized in *South Dakota v. Opperman*, — U.S. —, 96 S. Ct. 3092 (1976). This has been followed in Pennsylvania so that warrantless inventory searches of automobiles are proper provided the Commonwealth proves that (1) the vehicle was lawfully within the custody of the police, and (2) the search was in fact an inventory search. *Commonwealth v. Randle*, 248 Pa. Super. 239 (1977). Finally, *Carroll v. United States*, 267 U.S. 132 (1925) provided what is known as the "automobile exception." In the instant case the search of the van driven was proper under the above exceptions.

The van, which defendant had been driving, was found around 4:00 a.m. in a dark and deserted area. Zettlemoyer said that it belonged to him. Nearby was found the body of DeVetsco who had obviously been shot. Sergeant Houtz, one of the Conrail Officers who came upon the defendant literally with a smoking gun in his hand standing beside the vehicle, testified that looking in the van's unobstructed windows he observed a blanket with what appeared to be blood on it. The vehicle was therefore removed from this desolate place and taken to City Hall. It was determined that it was registered to the defendant's mother and although contact could not be made with her, the defendant's father said that he wanted the van to be released to him since he intended to use it to move. The van was then searched without a warrant. The items found therein included a .22 caliber pistol, two spent .22 caliber casings and mutilated bullet fragments. The inventory search was pursuant to written regulations of the Harrisburg Police Department requiring the contents of a vehicle be itemized before it is placed in storage.

It is often expressed policy of the United States Supreme Court that seizure of items within the "plain view" of officers who are legitimately in a position to obtain that view is permissible. *Harris v. U.S.*, 390 U.S. 234 (1968). As the court noted in *Harris*, an officer is not required to avert his eyes when confronted with evidence of crime. Pennsylvania has long adhered to this doctrine provided that the officer has a right to be in a position to have that view. *Commonwealth v. Jannek*, 442 Pa. Super. 340 (1976). In the instant case the facts speak for themselves. The officers were patrolling a railroad property, heard gunshots and found the expiring body of the victim and the defendant in the immediate vicinity of a parked vehicle which the defendant claimed he had been driving. In looking through the window of the vehicle, there was disclosed what appeared to be evidence of a crime, i.e. a blood stained rug. Thus the officers had a right to enter the vehicle and once inside, seize the other items which were then in plain view.

In addition, the requirements of the inventory exception are met. It was obvious that the vehicle was involved in criminal activities and hence it was proper for the police to take it into custody. It could not be determined immediately to whom it in fact actually belonged. It was claimed by the defendant, registered in his mother's name and requested by his father. Police regulations required that its contents be inventoried before it was placed in storage.

The search of the van the defendant was operating was also valid under the *Carroll-Chambers* rule.[1] The *Carroll* doctrine permits warrantless searches of automobiles upon probable cause arising out of circumstances known to the seizing officer that an automobile or other vehicle contains that which is subject to seizure and destruction. The *Chambers* decision took the *Carroll* doctrine one step further. The court in *Chambers* held that in circumstances where the vehicle could have been searched on the spot where it was stopped, it is not unreasonable to seize the vehicle and bring it to the police station for the search there instead. In *Chambers*, by way of footnote, the court noted that:

> It was not unreasonable in this case to take the car to the station house. All occupants in the car were arrested in a dock parking lot in the middle of the night. A careful search at that point was impractical and perhaps

1. *Carroll v. United States*, 267 U.S. 132, 45 S. Ct. 280, 69 L.Ed. 543 (1925); *Chambers v. Maroney*, 399 U.S. 42, 90 S. Ct. 1975, 26 L.Ed. 2d 419 (1970).

not safe for the officers, and it would serve the owner's convenience and the safety of his car to have the vehicle and the keys together at the station house. 90 S. Ct. at 1981.

See, also *Texas v. White*, 423 U.S. 76 (1975). The *Carroll-Chambers* doctrine has been accepted in Pennsylvania. *Commonwealth v. Story*, ___ Pa. Super. ___, 410 A.2d 1251 (1979).

II. THE REQUIRED FURNISHING OF THE DEFENDANT'S PSYCHOLOGICAL REPORT TO THE COMMONWEALTH

By letter dated January 27, 1981 the defendant requested discovery pursuant to Pa.R.Crim.P. 305. One of the items requested were the results of any scientific test, examination, expert opinion, etc. of the defendant in the possession or control of the Commonwealth and such reports were provided to the defense.

On April 2, 1981, the defendant filed a Notice of Insanity or Mental Infirmity Defense with the Court. The notice was vague and not in line with the requirements of Pa.R.Crim.P. 305(C)(1)(b).

On April 6, in response to the above, the District Attorney filed a Petition to Enforce Mandatory Discovery. By Order dated April 14, 1981 the defendant was required to furnish the Commonwealth with the report of Dr. Stanley Schnieder, a defense psychologist.

Rule 305(c)(1)(b) of the Pennsylvania Rules of Criminal Procedure, relating to mandatory disclosure by the defendant, stated that:

> A defendant who intends to offer at trial the defense of insanity, or a claim of mental infirmity, shall, at the time required for filing an omnibus pre trial motion under Rule 306, file of record notice signed by the defendant or the attorney for the defendant, with proof of service upon the attorney for the Commonwealth, specifying intention to claim such defense. Such notice shall contain specific available information as to the *nature and extent of the alleged insanity or claim of mental infirmity, the period of time which the defendant allegedly suffered from such insanity or mental infirmity* and the names and addresses of witnesses, expert or otherwise, whom the defendant intends to call at trial to establish such defense. (emphasis added).

In addition, Rule 305(C)(2)(a), relating to discretionary disclosure by the defendant, states that:

In all court cases, if the Commonwealth files a Motion for Pre-Trial Discovery, the court may order the defendant, subject to the defendant's rights against compulsory self incrimination, to allow the attorney for the Commonwealth to inspect and copy or photograph any of the following requested items, upon a showing of materiality to the preparation of the Commonwealth's case and that the request is reasonable:

> (a) results or reports of physical or mental examinations, . . . or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief, or which were prepared by a witness whom the defendant intends to call at the trial, which results or reports relate to the testimony of that witness, provided the defendant has requested and received discovery under paragraph (B)(1)(e).

The trial court properly exercised discretion considering defendant's failure to comply with the clear language of Rule 305 (C)(1)(b) requiring a specific information as to the nature and extent of the alleged mental infirmities.

The defense argues that the report contained testimonial evidence and so was protected by the Fifth Amendment as well as by the Pennsylvania Rules of Criminal Procedure relating to discovery. In support of this argument the defendant cites *Commonwealth v. Pompeni*, 447 Pa. 154 (1971) and *Commonwealth v. Hale*, 467 Pa. 293 (1976). Apparently the defendant is arguing that the entire report is testimonial in nature and thereby protected. However, the Commonwealth did not request nor did it receive any portion of the report in which the defendant himself is quoted as making incriminatory statements, but only received those portions of the report which were non-testimonial in nature. The Commonwealth did not attempt to request the defendant to submit to a psychiatric examination to which he did not consent, nor did the Commonwealth seek to compel the defendant to speak against his will. Rather it merely sought to have made available to it that information which is non-testimonial in nature relating to a psychiatric and psychological examination to which the defendant willingly consented. No Pennsylvania cases rule that the Commonwealth is not entitled to such evidence, and in fact the law of discovery make it clear that the Commonwealth is entitled to it under conditions here present.

The *Pomponi* and *Hale* cases are not supportive of defendant's position. Those cases deal with the Commonwealth's attempt to force the defendant to submit to a psychiatric examination *(Pomponi)* and an intentional misrepresentation to the defendant that his responses would only be used at sentencing and not at trial *(Hale)*.

III. THE REFUSAL TO ALLOW DEFENDANT'S PSYCHOLOGIST TO EXPRESS AN OPINION ON THE DEFENDANT'S MENTAL CAPACITY AT THE TIME OF THE KILLING:

The defense called as an expert witness, Stanley Schnieder, a licensed psychologist who had interviewed the defendant some four months after the slaying. Schnieder testified that: he found no evidence of organic or physical involvement, nor any suggestion of trauma to the defendant's brain or central nervous system (N.T. 710); that the defendant was not psychotic and was in touch with reality (N.T. 711); that too much emotional stimulation may precipitate a loss of judgment (N.T. 711); that the defendant was self-centered, had been protected and indulged and puts up a facade, a veneer, a very macho image of himself (N.T. 712); that the defendant was a weak, inadequate, ineffective and dependent person (N.T. 712); that the defendant had average intelligence and that he had only looked at the defendant's tenth grade school record (N.T. 713). Dr. Schnieder then diagnosed the defendant as having a schizoid personality with paranoid and inadequate features (N.T. 714). Schnieder went on to describe this in detail:

> A personality disorder is a lifelong set of rather established, well entrenched personality traits. A schizoid personality is an individual who is eccentric, may be referred to as queer in terms of, not his sexual preferences but his behavior, shy, sensitive, usually detached, seemingly unemotional in the face of upsetting events and experiences. There is typically a defect in the capacity to form social relationships. There is little or no desire for social involvement. They are usually loners. They have few close friends, reserved, withdrawn, reclusive. They usually pursue solitary interests and jobs, often humorless, dull, cold and aloof. These are typical depictors of a schizoid personality. (N.T. 716).

Dr. Schnieder further testified as follows:

> "I find that Mr. Zettlemoyer is a pampered, doted upon, catered to, in simple terminology spoiled brat who figured out how to get what he wanted, either directly or

by manipulating or controlling the situation to get what he wanted his entire life . . . ." (N.T. 720).

He also said he was unable to state what the defendant's judgment was as close as two weeks before the slaying (N.T. 721). It was further developed that one of the tests the doctor was relying upon for his conclusions had been left with the defendant at the prison and that the doctor was unable to say whether the defendant or another person actually answered the test questions (N.T. 737); that since the defendant was not psychotic and, therefore, not out of touch with reality, he knew the significance of the shooting and killing DeVetero, a witness against him in a felony trial (N.T. 742); *that there appeared to be a tremendous amount of planning involved with the execution of this crime* (N.T. 742); and that just because the defendant had a personality disorder, this does not place the defendant in a different class from other run-of-the-mill criminals (N.T. 744).

Defense counsel then asked Dr. Schnieder if at the time of the killing on October 13, 1980 the defendant, due to all that was previously testified to, was able to form the specific intent to kill. The Commonwealth objected primarily on the basis of the lack of proper foundation and the objection was sustained. A review of the doctor's testimony reveals it to be ambivalent in a number of places. Furthermore, it is clear from all the doctor testified to, as delineated above, the proper foundation was not laid nor was the doctor in possession of sufficient facts to enable him to give an expert opinion as to whether or not on the night of October 13, 1980 the defendant was able to form the specific intent to kill. The psychologist admitted that he was unable to say what the defendant's judgment may have been as close as two weeks prior to the slaying. If anything, his testimony displayed a lack of an insanity or a diminished capacity defense. His testimony as to a "pressure cooker syndrome" (N.T. 719) appears to be in the genre of an irresistible impulse defense that is not recognized in Pennsylvania. *Commonwealth v. Roth*, 474 Pa. 171 (1977). Testimony that the defendant was "self-centered" and a spoiled brat could hardly be deemed to be observations supportive of an expert opinion that the defendant could not perform a specific cognative process, i.e. the intent to kill. Indeed, if anything, the doctor's testimony suggests the defendant took rational means to achieve his goal of eliminating a key prosecution witness. In light of the above, the trial court properly refused to permit Schnieder to express the requested opinion. In any event, Schnieder testified at great length to the defendant's personality disorders, family and

personal problems and the testing performed upon the defendant (N.T. 690-730). The jury had the benefit of this testimony to use in its deliberations and the court so instructed (N.T. 818).

Defendant's argument that such an opinion was permitted in *Commonwealth v. Sourbeer*, ___ Pa. ___, 422 A.2d 116 (1980) and *Commonwealth v. Brantner*, 486 Pa. 518 (1979) is not persuasive as there no issue was presented concerning facts known to the expert or lack of foundation.

It should further be noted that in *Brantner* the *psychiatrist* testified that on the *day of the shooting* defendant had a schizoid personality and was paranoid.

IV. THE COURT'S CHARGE ON DIMINISHED CAPACITY

The defense of diminished capacity was judicially enacted by our Supreme Court in *Commonwealth v. Walzak*, 468 Pa. 210 (1976) where a conviction was reversed because the trial court rejected psychiatric evidence that the defendant, as the result of a lobotomy, did not possess sufficient mental capacity to form the required specific intent for a conviction of murder in the first degree. Justice Nix, writing for the majority, made it clear that the decision in no way affected the vitality of the McNaughten test nor did it inferentially accept the irresponsible impulse test and that it was applicable only to the specific intent required for murder in the first degree. It has been referred to, although not discussed at any length, in two subsequent decisions, *Commonwealth v. Brantner*, 486 Pa. 518 (1979) and *Commonwealth v. Sourbeer*, ___ Pa. ___, 422 A.2d 116 (1980). In the *Brantner* case a psychiatrist testified that on the day of the shooting the defendant had a schizoid personality and was paranoid. The prosecution offered the defendant's own statement reflecting a consciousness of his act and also produced lay testimony to this effect. The court merely held that under all circumstances the evidence was sufficient to permit the jury to reject any suggestion of diminished capacity. The *Sourbeer* case involved a killing by a 14 year old and the only mention of the issue was a footnote which inferentially adopted the trial court's charge.

The defendant asserts here that the court's charge to the jury on what constituted a defense of diminished capacity left it with the impression that it was not proven in the instant case. As is usual in such complaints, isolated portions of the charge are extracted with materially qualifying sentences or phrases conveniently omitted. We set forth below the objected to portion of the court's charge inserting by italicizing that part which defendant failed to set forth:

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> You must keep in mind, that we can not use, when we are talking about a diminished mental capacity, we are talking about something that prevents the defendant from having a specific intent to kill. It is not an excuse for antisocial behavior. It is not something that excuses someone who is spoiled or pampered or someone who loses their control or judgment under stress, somebody who has a poor life style, is a loser in life, somebody who reacts to stress by violence; that is not what we are talking about. *If you are satisfied and the Commonwealth has proven to you beyond a reasonable doubt that he had specific intent to kill, the defense says because of all these things, because of his personality, he could not form the specific intent to kill.* That is what diminished capacity means. He did not have the capacity to form the intent to kill. It is not an excuse for a personality disorder or someone who is antisocial, but it is evidence, and you have heard it from family, *you have heard it from a psychologist and you take that evidence into account in deciding the issue as to whether at the time the crime was committed, at the time Mr. Del'Cetto was murdered, the defendant had a specific intent to kill him. That is the issue and that is where the evidence becomes relevant.*
>
> The defense is that because of his life style, or his personality, and you have heard all about that, that he lacked the specific intent to kill. *Well, if he didn't have it at the time he committed the crime, the specific intent to kill, then he can't be guilty of murder in the first degree.* (N.T. 811, 812, 813)

The governing principal is Hornbook law. As stated in *Commonwealth v. Hobson*, 484 Pa. 230, 238 (1979):

> In a multitude of decisions, this Court has ruled that in evaluating the correctness of instructions to a trial jury, the charge must be read and considered as a whole, and it is the general effect of the charge that controls. For example, see *Commonwealth v. Bell*, 453 Pa. 531, 309 A.2d 417 (1973); *Commonwealth v. Zapata*, 447 Pa. 322, 290 A.2d 114 (1972); *Commonwealth v. Heasley*, 444 Pa. 454, 281 A.2d 848 (1971); and *Commonwealth v. Franklin*, 438 Pa. 411, 265 A.2d 361 (1970) . . . .

In addition, the court further charged on diminished capacity as follows:

. . . [b]ut I will charge on diminished capacity. I may have—I will say this, as I have told you, the intentional killing required for first degree murder is willful, deliberate and premeditated. The killer must make a conscious decision to kill and must have a fully formed intent to kill. In determining whether or not the defendant committed the kind of intentional killing required for first degree murder, you should consider any testimony which may shed light on what was going on in the defendant's mind at the time of the alleged killing. (N.T. 814)

and concluded with the following:

The Court: The mere fact that the Commonwealth produced evidence tending to show that the defendant may have had a motive to kill or that he planned and premeditated the killing does not necessarily eliminate the defense of diminished capacity. If you have a reasonable doubt that during that time period in which the defendant planned and premeditated that he suffered a mental illness, defect or abnormality which prevented him from fully forming the specific intent required for murder of the first degree then you must find him not guilty of first degree murder. I affirm that but again. I call your attention to the fact that the defense of diminished capacity is whether or not—the issue is did he possess sufficient mental capacity to form the specific intent required at the time he committed the killing but, of course, the background may be evidence on that. Now, I commented to you and whatever I said is on the record. I don't recall it verbatim, that diminished capacity does not mean somebody who was antisocial or who was prone to violence or who was tempermental and can't control himself and can't react to stress. I say that again, that should be pretty obvious. However, I am not saying that you should disregard the evidence about the defendant's personality. It is relevant, you may use it as relevant as to whether or not at the time he killed DeVetsco, he had the specific intent to kill.

I also mention the case in which this doctrine of diminished capacity came into the law of Pennsylvania and I mentioned to you that it involved an offer of psychiatric testimony concerning that the defendant had a lobotomy. Now, I didn't mean that to say that's the type of case that you have to have, such an extreme case. There have

> been since then two other cases that I know of and they did not involve this type of illness. I don't recall what they did, what the testimony was but I merely gave you that historically just to show you how it started. (N.T. 818, 819).

We reject defendant's diminished reading of the record and hold that it is clear taking the charge in its full capacity that the issue was squarely and fairly left to the jury.

V. THE ADMISSION OF A PHOTOGRAPH OF THE VICTIM AND MEDICAL TESTS OF THE DEFENDANT

It is somewhat quaint that in todays' era of pictorial violence especially as evidenced by TV and the movies, objections should be seriously considered to the admission of a black and white still photograph of a dead body. Multicolored sometimes live scenes of the most extreme violence have surely conditioned the public so that any jury has become somewhat desensitized. If in the past year we have seen before our very eyes attempts, successful and otherwise, to kill the President, the Pope and a World Leader, it is believed that one could with some equanimity view the picture in question which shows the victim's clothed body lying on its stomach with a bullet hole in his back.

The photograph of a corpse is not per se inflammatory. *Commonwealth v. Collins*, 440 Pa. 368 (1970). The admitted picture is not a close-up, it is in black and white and not particularly gruesome. See, *Commonwealth v. Yast*, 478 Pa. 327 (1978).

In *Commonwealth v. Petrakovich*, 459 Pa. 511, 521 (1974) it was stated:

> We have consistently held that the question of admissibility of photographs of a corpse in homicide cases is a matter within the discretion of the trial judge and only an abuse of that discretion will constitute reversible error .... When the trial judge is confronted with gruesome or potentially inflammatory photographs, the test for determining their admissibility which he must apply is 'whether or not the photographs are of such essential evidentiary value that their need clearly outweighs the likelihood of inflaming the minds and passions of the jurors'. *Commonwealth v. Powell*, 428 Pa. 278, 279, 241 A.2d 121 (1968).

As stated above we do not feel the admitted photograph to be inflammatory. It should also be noted that a closeup of the same view was not admitted. See, *Commonwealth v. Edwards*, ___ Pa. ___ , 426 A.2d 550 (Mar. 1981) where far more potentially inflammatory photographs were permitted. In any case, it was of essential evidentiary value as it indicated the position of the body, shows that the victim may have been handcuffed and in showing the brush burns on the back and upper buttocks, indicates that the victim was dragged from the van to where he was found. All of this suports the Commonwealth's contention that the slaying was an execution type killing, thus willful and premeditated and calling for a first degree conviction.

The tests referred to are a blood and urine stream test administered several hours after the killing because the defendant told the doctor at the hospital that he had taken a handful of Comtrex, Valium and Dristan. The objection was based on the fact that the doctor who testified had not actually performed the tests. However, it was established that they were done in the ordinary business routine of the hospital, that the doctor had numerous occasions to read such results and could make a diagnosis or perform treatment based on such results. The tests indicated that the defendant had not taken Valium but had ingested some sort of cough medicine.

It should be noted that the test results indicated nothing detrimental to the defendant other than the absence of Valium and in fact supported his statement to the extent that he had taken several antihistamine agents.

The presence or absence of Valium was a fact, not a medical conclusion. Thus the medical test results were properly admitted under the Business Record Exception to the hearsay rule. See, *Commonwealth v. Campbell*, 244 Pa. Super 505 (1977) where the presence or absence of a spermatozoa in the vagina was held to be a fact and not a medical conclusion and *Commonwealth v. Seville*, 266 Pa. Super. 587 (1979) where it was held that the results of a blood alcohol test could be admitted into evidence even though the hospital technician who administered the test was not present at the trial.

VI. QUESTIONS ON VOIR DIRE

The trial court is charged with error in denying certain voir dire questions.[2] In *Commonwealth v. England*, 474 Pa. 1,6,7,8 (1977) we find the guiding principle:

> [1,2] The single goal in permitting the questioning of prospective jurors is to provide the accused with a 'competent, fair, impartial and unprejudiced jury' *Commonwealth v. McGrew*, 375 Pa. 518, 525, 100 A.2d 467, 470 (1953); see, also, *Commonwealth v. Dukes*, 460 Pa. 180, 186, 331 A.2d 478, 481 (1975); *Commonwealth v. Birbighauser*, 450 Pa. 336, 345, 300 A.2d 70, 75 (1973); U.S. Const. amends. VI, XIV, Pa. Const. art. I, §§ 6,9. Voir dire examination is not intended to provide a defendant with a better basis upon which to utilize his peremptory challenges:
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> . . . .
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> [3] Thus, although latitude should be permitted on a voir dire, the inquiry should be strictly confined to disclosing qualifications or lack of qualifications and 'whether or not the juror had formed a fixed opinion in the case as to the accused's guilt or innocence.' *Commonwealth v. Lopinson*, supra 427 Pa. at 298, 234 A.2d at 561; see, also *Commonwealth v. Martin*, 465 Pa. 134, 158, 348 A.2d 391, 403 (1975); *Commonwealth v. Reynell*, 448 Pa. 162, 175, 292 A.2d 365, 371-372 (1972); *Commonwealth v. Hoss*, 445 Pa. 98, 107, 283 A.2d 58, 63 (1971).
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2. Question 17. The defense in this case will admit the fact that on October 13, 1980, Keith Zettlemoyer killed Charles DeVetsco. However, the defense expects to show that Mr. Zettlemoyer was suffering a mental illness at the time of the killing and therefore was not fully responsible for his actions. Would you be willing to consider such evidence concerning the defendant's mental illness and return an appropriate verdict if you conclude on the evidence that even though the defendant killed Mr. DeVetsco, he was under a diminished capacity?

Question 18. Do you understand that the defendant is presumed innocent, that all the elements of the crime charged, including mental capacity, must be proven by the Commonwealth beyond a reasonable doubt, and that if one element is not proven, the defendant must be found not guilty?

Question 19. Knowing that the burden of proving the defendant guilty beyond a reasonable doubt rests with the prosecution would you require the accused at any time to satisfy you as to his innocence?

Question 20. Would you give the defendant the benefit of your individual judgment in this case? In doing so would the fact that your opinion as to innocence or guilt was in the minority influence your vote at all?

[4] A trial court's refusal to permit certain hypothetical questions on voir dire will not be disturbed absent a palpable abuse of discretion. *Commonwealth v. Segers*, 460 Pa. 149, 156, 331 A.2d 462, 466 (1975); *Commonwealth v. McGrew*, supra 375 Pa. at 526-27, 100 A.2d at 471. We are satisfied that no abuse of discretion occurred in this case.

The proposed questions all pertain to matters which are properly dealt with and were covered in the court's charge. *Commonwealth v. Perez*, 252 Pa. 272 (1977). The Supreme Court has specifically ruled against questions with respect to a veniremen opinion on psychiatric testimony (*Commonwealth v. Johnson*, 454 Pa. 130 (1973)) and with questions concerning a proposed juror's understanding of the law (*Commonwealth v. Lopison*, 427 Pa. 284 (1967) and *Commonwealth v. Hoffman*, 263 Pa. Super. 442 (1979)).

The other objection was to the court's denial of defendant's request to exclude any and all questions relating to death penalty attitudes of prospective jurors on the basis that "death qualified" jurors constitute a conviction prone unrepresentative class and that any questions concerning the death penalty are unconstitutional.

The defendant does not object to the form of the questions, but simply to the asking of any questions at all. Such interrogation is expressly permitted in *Witherspoon v. Illinois*, 391 U.S. 510 (1967) and recently re-affirmed in *Adams v. Texas*, 448 U.S. 38 (1980). In the latter case, Justice White delivering the opinion of the court stated: "[W]e repeat that the State may bar from jury service those whose beliefs about capital punishment would lead them to ignore the law or violate their oaths." What would be the sense of the Commonwealth seeking the death penalty if one of the jurors swore in advance that under no circumstances would he return such a verdict. It would be a cute but effective way of eliminating the death penalty and somewhat like starting a chess game without your Queen. If the defendant is entitled to a neutral jury as he surely is, the people represented by the Commonwealth are entitled to no less. One might as well try a defendant before a jury composed only of his family and closest friends.

The broader objection concerning the constitutionality slides into the next issue.

VII. THE CONSTITUTIONALITY OF THE DEATH PENALTY

The Fifth Amendment would appear to authorize the death penalty for in stating that no one shall be "deprived of life, liberty or property without due process of law" it clearly implies that if due process is afforded the State may indeed take the life of one of its offending citizens. The Eighth Amendment prohibiting cruel and unusual punishment was passed at the same time and can hardly have been intended to supersede the Fifth Amendment. It is manifest that the death penalty was not considered cruel and unusual punishment. The Fourteenth Amendment in imposing the Federal restrictions upon the States repeats the prohibition of the deprivation of life, liberty and property without due process.

Our state constitution contained similar language. Article I, Section 9 provides ". . . nor can he be deprived of his life, liberty or property, unless by the judgment of his peers by the law of the land" and Article I, Section 13 ". . . excessive bail shall not be required, nor excessive fines imposed, nor cruel punishment inflicted."

Pennsylvania's death penalty act prior to the enactment of the new Crimes Code was the Act of June 24, 1939, P. L. 872, §701, as amended, 18 P.S. 4701. That statute was invalidated in *Commonwealth v. Bradley*, 449 Pa. 19 (1972) on September 19, 1972 following the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972) handed down on June 29th of that year.

Section 1102 of the Crimes Code, enacted in 1972, P. L. 1520, Act No. 334, replacing the old death penalty legislation, took effect on June 6, 1973. However, that act simply provided that "[a] person who has been convicted of murder in the first degree shall be sentenced to death or a term of life imprisonment." No sentencing procedures were provided for. Section 1102 was therefore clearly unconstitutional under the *Furman* standards at the time of its adoption, as the Pennsylvania Supreme Court held in *Commonwealth v. McKenna*, 476 Pa. 428 (1978). Though it could never have been constitutionally applied, §1102 did reflect a legislative attitude in favor of the death penalty.

In 1974, §1102 was amended and §1311 added to the Crimes Code in an attempt to bring the death penalty legislation into conformity with the *Furman* decision. Act of March 26, 1974, P.L. 214, No. 46. These sections were re-enacted without change on December 30, 1974 as a part of the new Sentencing Code.

In *Commonwealth v. Moody*, 476 Pa. 223 (1977) the death penalty sections of the new Sentencing Code were struck down.

The court found them deficient in restricting mitigating circumstances thus not giving the sentencing authority the wide latitude required by the United States Supreme Court in *Gregg v. Georgia*, 428 U.S. 153 (1976).

It was not until the *Gregg* decision that the Supreme Court of the United States directly held for the first time that "the punishment of death does not invariably violate the constitution." It seems apparent from the decision and subsequent ones that a solid majority of the United States Supreme Court allows in the context of contemporary morality the death penalty. The court's concern is not with the constitutionality of the death penalty per se, but the manner in which the decision to impose it is reached. While two members of the Supreme Court determined in 1972 that the punishment of death is cruel and unusual and the States may no longer inflict it, this was not the holding of the decision. The simple majority in *Furman v. Georgia*, supra, held that the procedure then employed in determining capital cases was constitutionally inadequate.

In *Gregg v. Georgia*, supra, after stating that the court on a number of occasions has both assumed and asserted the constitutionality of capital punishment went on to note that the most marked indication of society's endorsement of the death penalty for murder was the legislative response to *Furman* in that at least 35 states have enacted new statutes providing for the death penalty. Mr. Justice Stewart said (at p. 183) "[t]he death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders. In part capital punishment is an expression of society's moral outrage at particularly offensive conduct." He went on to state (at p. 187) ". . . [w]hen a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes."

> In summary, the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statement that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information. *Gregg v. Georgia*, 428 U.S. 153, 195 (1976).

The court then examined the Georgia law noting that since its procedures required as a prerequisite to the imposition of the death penalty specific jury findings as to the circumstances of the crime or the character of the defendant and mandatory review by the Supreme Court of Georgia, the statutory system did not violate the constitution.

An examination of the system approved in Georgia and presently enforced in Pennsylvania and under which the defendant was sentenced shows that it clearly follows the guidelines set down in *Gregg v. Georgia*, supra. In *Commonwealth v. Moody*, supra, the court contrasted the then inadequate statute with the one approved in Georgia giving the defendant and sentencing authority wide latitude as to the type of mitigating circumstances which may be presented. It should be noted that the Pennsylvania statutes after enumerating specifically seven mitigating circumstances provides for "[a]ny other evidence of mitigating circumstances concerning the character and record of the defendant and the circumstances of his offense." 42 Pa. C.S.A. 9711(E)(8). One of the latest United States Supreme Court cases on the death penalty, *Lockett v. Ohio*, 438 U.S. 586 (1978) struck down in Ohio a death penalty statute because of a limited range of mitigating circumstances.

It seems evident that the Pennsylvania death penalty statute as now enacted meets the criteria of the decisions by the Supreme Court since there are sufficient mitigating circumstances. In fact, almost anything can be entered under Section 8. As noted above some 36 states have enacted the death penalty statutes since the *Furman* decision and a recent Gallup poll indicates that 2/3 of those surveyed favor the death penalty for premeditated murder.

Thus, there is not only a firm constitutional basis but a moral concensus as confirmed by legislative and popular support that the imposition of the death penalty is neither cruel nor unusual in this latter part of the 20th century.

Within the past several months Justice William Rehnquist has had occasion to quote Justice Stewart's remarks in *Furman v. Georgia*, supra, "[w]hen people begin to believe that organized society is unwilling or unable to impose on criminal offenders the punishment they deserve, then they have sown the seeds of anarchy —of self-help, vigilante justice and lynchlaw."

VIII. THE SUFFICIENCY OF THE EVIDENCE TO SUSTAIN THE DEATH PENALTY

The jury imposed the death penalty on Keith Zettlemoyer because they found that the aggravating circumstance of the murder of a prosecution witness to prevent his testifying in a felony case outweighed the mitigating circumstances. This was in accordance with Section 9711(C)(4) of the Sentencing Code which provides:

> "The verdict must be a sentence of death . . . if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances."

At the sentencing stage the Commonwealth read into evidence by stipulation pending charges against the defendant in Snyder County for felonies of robbery, burglary and kidnapping. Objection is made on the grounds the Commonwealth did not show that Mr. DeVetsco would have been an eye witness and that he had not actually been subpoenaed. The Sentencing Code does not state that the victim need be an eye witness but simply a witness for the prosecution. It was further stipulated that the District Attorney of Snyder County would testify that the victim had not been subpoenaed because he had been killed the week before he was scheduled to appear as a witness. Clearly the Commonwealth proved beyond a reasonable doubt the applicability of the aggravating circumstance.

It is difficult to conceive that a reading of the basic charges in the indictments prejudice the defendant. The issue was not whether he in fact committed these offenses, but whether the victim was killed to prevent him from testifying at his trial. Furthermore, the court cautioned the jury:

> Ladies and gentlemen, the sole purpose of reading that, we are not of course concerned as such with those charges but under the law, one of the aggravating circumstances under which the death penalty may be brought, and I will explain this more fully, one of the aggravating circumstances is that the victim was a prosecution witness to a felony committed by the defendant was was [sic] killed for the purpose of preventing his testimony against the defendant, and that was the purpose of admitting this evidence, and the sole purpose of it.

The defendant presented evidence of five mitigating circumstances encompassed within Section 9711(e)(1)(2)(3)(4) and (8).[3]

The court then instructed the jury as follows:

> . . . [u]nder the law, as I said, you are obligated by your oath of office to fix the penalty at death if you unanimously agree and find beyond a reasonable doubt that there is an aggravating circumstance and either no mitigating circumstance or that the aggravating circumstance outweighs any mitigating circumstances. Now, there has been evidence from which you could find mitigating circumstances. In fact, the one mitigating circumstance is agreed to, that he has no significant history of prior criminal convictions, but what you have to decide is whether the aggravating circumstance, if you find such, outweighs any mitigating and if it does, then your penalty must be death (N.T. 39,40).

Under the decisions of the Supreme Court and in accordance with the Pennsylvania Sentencing Code it was for the jury to determine whether the aggravating circumstances outweighed the mitigating circumstances. This determination was solely their responsibility. Apparently the defendant would have the court reduce the punishment determining process to a mere numbers game, i.e. five mitigating circumstances or more than one aggravating, ergo a life sentence was returned. This is not the law.

IX. THE DETERRENT EFFECT OF THE DEATH PENALTY

In discussing with the jury the sentence to be imposed the District Attorney asked for the death penalty arguing that the killing of a witness was an attack on the judicial system. He stated that such a procedure if not severely punished would have the effect of inhibiting witnesses from coming forward and testifying concluding with:

> You have to consider number one, the appropriate punishment and number two, you have to consider what, if any, deterrent effect your decision should have—
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> . . .

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3. Section 9711(e)
(1) The defendant has no significant history of prior criminal convictions.
(2) The defendant was under the influence of extreme mental or emotional disturbance.
(3) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
(4) The age of the defendant at the time of the crime.
(8) Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offenses.

> You, as the jury, have a right to consider upholding the system. You, as a jury, have a right to consider what effect your decision as to the penalty we impose on Mr. Zettlemoyer, what place the deterrent effect should play in that decision and I submit to you it is a very important one and it is a crucial one.
>
> The Commonwealth simply asks for a just decision in this case. We ask for a just decision based on everything you have heard during the trial. You heard it, you were right here in the room, you heard everything. We submit to you that the death penalty in this case is justified because of the nature of the crime, because of its attacks upon our system of justice and we ask you to consider all those factors. (N.T. 31,32 Court's Charge)

A full reading of the District Attorney's closing indicates that the reference to the deterrent effect is basically an attempt to amplify the aggravating nature of the defendant's deed. Mr. Lewis' summation which was brief was calm, not inflammatory and quite professional.

The law has always recognized that a District Attorney, just as defense counsel, must have reasonable attitude in arguing his position to the jury. *Commonwealth v. Smith*, 490 Pa. 380 (1980) and that any alleged prejudicial effect must be evaluated in the context in which it occurs. *Commonwealth v. Perkins*, 473 Pa. 116 (1977). As stated in *Commonwealth v. Brown*, 489 Pa. 285, 297 (1980): "[i]n making such a judgment, we must not lose sight of the fact that the trial is an adversary proceeding. Code of Professional Responsibility, *Canon 7*, E.C. 7-19-7-39, and the prosecution, like the defense, must be accorded reasonable latitude in fairly presenting its version of the case to the jury." While it is correct that prosecution may not refer to facts outside the record, it is also correct that there is an important exception to this rule, i.e. "unless such facts are matter of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice." *Commonwealth v. Dauzy*, 234 Pa. Super. 633, 638 (1975).

Most everyone will agree that punishment of some kind has a deterrent effect to some extent. In early childhood, before we learned to respect and value rules and laws for their inherent good, we learned to obey by punishment, or fear of punishment. Throughout all of life, one's conduct, at least partially, is controlled by this factor. Highway safety is certainly conditioned upon loss

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of operating privileges and it is evident that the federal government and other taxing bodies will have a more difficult time than they are now having in balancing their budgets if tax evasion was not attendant by rather serious consequences. One could make the point, at least in bygone days, that the fear of hell perhaps more than the love of God made a lot of people good Christians.

All this is rather obvious and the point is that if slight punishment deters, greater punishment is a greater deterrent and the ultimate punishment—death—should be the ultimate in deterrence. The greatest single fear that is common to all mankind is the fear of death. In light of the enormity of that fear and of the fundamental drive for self-preservation, it counters good common sense to maintain that these drives are inadequate to deter some potential killers from taking life.

While there is no evidence of any valid statistical study on the correlation between the *carrying out* of the death penalty and the number of murders, it is a fact that executions in the past ten years have been minimal and the murder rate has been soaring.

It would seem therefore that the prosecutor's oblique reference to a deterrent effect while technically outside the record is a matter of common knowledge based on the experience of the ages, a matter which the court can certainly note.

As stated by one of the leading authorities on the issue, Professor Ernest van den Haag:

> Our penal system rests on the proposition that more severe penalties are more deterrent than less severe penalties. We assume, rightly, I believe, that a $5 fine deters rape less than a $500 fine, and that the threat of five years in prison will deter more than either fine. This assumption of the penal system rests on the common experience that, once aware of them, people learn to avoid natural dangers the more likely these are to be injurious and the more severe the likely injuries. People endowed with ordinary common sense (a class which includes some sociologists) have found no reason why behavior with respect to legal dangers should differ from behavior with respect to natural dangers. Indeed, it does not. Hence, the legal system proportions threatened penalties to the gravity of crimes, both to do justice and to achieve deterrence in proportion to that gravity. Criminal Law Bulletin, Vol. 14, No. 1 pgs. 51, 59, 60

We conclude, therefore, that the death penalty imposed by the ury is constitutional both under the Federal and State constitu-ions and in conformity with the decisions of the United States nd Pennsylvania Supreme Courts, that no trial errors were com-itted and that the evidence fully warranted this extreme penalty.

Accordingly, we enter the following:

ORDER

AND NOW, this 16th day of October, 1981, defendant's post-rial motions are overruled and the District Attorney is directed o produce the defendant before the court on the .— day of October, 1981 so that a date for the carrying out of the sentence an be imposed.

APPENDIX - PART 3A

U.S. Const. Amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. Amend. XIV §1:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Library References

Criminal Law C1077 et seq. C.J.S. Criminal Law § 1553 et seq.

Notes of Decisions

In general

Sentencing Act was not applicable with respect to sentencing which occurred after the effective date of the Act, where the offense occurred prior to the effective date of the Act. Com. v. Harris, 421 A.2d 728, 280 Pa. 287, 1980.

9702. Definitions

As used in this chapter "court" and "judge" include (when exercising criminal or quasi-criminal jurisdiction pursuant to section 5115 (relating to jurisdiction and venue)) a district justice.

1980, Oct. 5, P.L. 693, No. 142, § 401(a), effective in 60 days.

9703. Scope of chapter

Except as otherwise specifically provided in this chapter, in all cases the sentence to be imposed shall be determined by the court as authorized by law.

1982, March 8, P.L. 109, No. 54, § 1, effective in 90 days.

SUBCHAPTER B

SENTENCING AUTHORITY

Sec.

9711. Sentencing procedure for murder of the first degree.
9712. Sentences for offenses committed with firearms.
9713. Sentences for offenses committed on public transportation.
9714. Sentences for second and subsequent offenses.
9715. Life imprisonment for homicide.
9716. Two or more mandatory minimum sentences applicable.

9711. Sentencing procedure for murder of the first degree

(a) Procedure in jury trials.—

(1) After a verdict of murder of the first degree is recorded and before the jury is discharged, the court shall conduct a separate sentencing hearing in which the jury shall determine

whether the defendant shall be sentenced to death or life imprisonment.

(2) In the sentencing hearing, evidence may be presented as to any matter that the court deems relevant and admissible on the question of the sentence to be imposed and shall include matters relating to any of the aggravating or mitigating circumstances specified in subsections (d) and (e). Evidence of aggravating circumstances shall be limited to those circumstances specified in subsection (d).

(3) After the presentation of evidence, the court shall permit counsel to present argument for or against the sentence of death. The court shall then instruct the jury in accordance with subsection (c).

(4) Failure of the jury to unanimously agree upon a sentence shall not impeach or in any way affect the guilty verdict previously recorded.

(b) Procedure in nonjury trials and guilty pleas.—If the defendant has waived a jury trial or pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant with the consent of the Commonwealth, in which case the trial judge shall hear the evidence and determine the penalty in the same manner as would a jury.

(c) Instructions to jury.—

(1) Before the jury retires to consider the sentencing verdict, the court shall instruct the jury on the following matters:

(i) the aggravating circumstances specified in subsection (d) as to which there is some evidence.

(ii) the mitigating circumstances specified in subsection (e) as to which there is some evidence.

(iii) aggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt; mitigating circumstances must be proved by the defendant by a preponderance of the evidence.

(iv) the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circum-

stances. The verdict must be a sentence of life imprisonment in all other cases.

(v) the court may, in its discretion, discharge the jury if it is of the opinion that further deliberation will not result in a unanimous agreement as to the sentence, in which case the court shall sentence the defendant to life imprisonment.

(2) The court shall instruct the jury on any other matter that may be just and proper under the circumstances.

(d) **Aggravating circumstances.**—Aggravating circumstances shall be limited to the following:

(1) The victim was a fireman, peace officer or public servant concerned in official detention, as defined in 18 Pa.C.S. § 5121 (relating to escape), who was killed in the performance of his duties.

(2) The defendant paid or was paid by another person or had contracted to pay or be paid by another person or had conspired to pay or be paid by another person for the killing of the victim.

(3) The victim was being held by the defendant for ransom or reward, or as a shield or hostage.

(4) The death of the victim occurred while defendant was engaged in the hijacking of an aircraft.

(5) The victim was a prosecution witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceeding involving such offenses.

(6) The defendant committed a killing while in the perpetration of a felony.

(7) In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense.

(8) The offense was committed by means of torture.

(9) The defendant has a significant history of felony convictions involving the use or threat of violence to the person.

(10) The defendant has been convicted of another Federal or State offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or

death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense.

(e) **Mitigating circumstances.**—Mitigating circumstances shall include the following:

(1) The defendant has no significant history of prior criminal convictions.

(2) The defendant was under the influence of extreme mental or emotional disturbance.

(3) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(4) The age of the defendant at the time of the crime.

(5) The defendant acted under extreme duress, although not such duress as to constitute a defense to prosecution under 18 Pa.C.S. § 309 (relating to duress), or acted under the substantial domination of another person.

(6) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal acts.

(7) The defendant's participation in the homicidal act was relatively minor.

(8) Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.

(f) **Sentencing verdict by the jury.**—

(1) After hearing all the evidence and receiving the instructions from the court, the jury shall deliberate and render a sentencing verdict. In rendering the verdict, if the sentence is death, the jury shall set forth in such form as designated by the court the findings upon which the sentence is based.

(2) Based upon these findings, the jury shall set forth in writing whether the sentence is death or life imprisonment.

(g) **Recording sentencing verdict.**—Whenever the jury shall agree upon a sentencing verdict, it shall be received and recorded by the court. The court shall thereafter impose upon the defendant the sentence fixed by the jury.

(h) Review of death sentence.—

(1) A sentence of death shall be subject to automatic review by the Supreme Court of Pennsylvania pursuant to its rules.

(2) In addition to its authority to correct errors at trial, the Supreme Court shall either affirm the sentence of death or vacate the sentence of death and remand for the imposition of a life imprisonment sentence.

(3) The Supreme Court shall affirm the sentence of death unless it determines that:

(i) the sentence of death was the product of passion, prejudice or any other arbitrary factor;

(ii) the evidence fails to support the finding of an aggravating circumstance specified in subsection (d); or

(iii) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant.

(i) Record of death sentence to Governor.—Where a sentence of death is upheld by the Supreme Court, the prothonotary of the Supreme Court shall transmit to the Governor a full and complete record of the trial, sentencing hearing, imposition of sentence and review by the Supreme Court.

1974, March 26, P.L. 213, No. 46, § 3, imd. effective. As amended 1974, Dec. 30, P.L. 1052, No. 345, § 1, effective in 90 days; 1978, Sept. 13, P.L. 756, No. 141, § 1, imd. effective; 1980, Oct. 5, P.L. 693, No. 142, § 401(a), effective in 60 days.

Historical Note

As originally enacted this section read:

"Sentencing for murder.

"(a) Findings by jury.—The jury before whom any person shall be tried for murder, shall, if they find such person guilty thereof, ascertain in their verdict whether the person is guilty of murder of the first degree, murder of the second degree or murder of the third degree.

"(b) Instructions to jury and recording verdict.—In a trial for murder, the court shall inform the jury prior to their deliberations, as to the penalties for murder of the first degree, murder of the second degree and murder of the third degree. The court shall also inform the jury that if they find the defendant guilty of murder of the first degree, it will be their further duty to determine whether the killing was accompanied by any aggravating or mitigating circumstances as set forth in subsection (d) of this section after hearing such additional evidence as may be submitted upon that question. Whenever the jury shall agree upon a verdict of murder of the first degree they shall immediately return and render the same, which shall be recorded, and shall not thereafter be subject to reconsideration by the jury, or any member thereof.

"(c) Procedure at sentencing hearing.—After such verdict is recorded and before the jury is permitted to separate, the court shall proceed to receive such

APPENDIX - PART 4

deterrent effect. I think the District Attorney should be only allowed to argue the law, that the law is specific that only those aggravating circumstances in the law can be considered. The deterrent effect of the death penalty has no place in their deliberations.

THE COURT: Overruled. Proceed.

MR. LEWIS: You, as the jury, have a right to consider upholding the system. You, as the jury, have a right to consider what effect your decision as to the penalty we impose on Mr. Zettlemoyer, what place the deterrent effect should play in that decision and I submit to you it is a very important one and it is a very crucial one.

The Commonwealth simply asks for a just decision in this case. We ask for a just decision based on everything you have heard during the trial. Incorporate all this testimony in your deliberations. You heard it, you were right here in the room, you heard everything. We submit to you that the death penalty in this case is justified because of the nature of the crime, because of its attack upon our system of justice and we ask you to consider all those factors.

Thank you very much for your attention.

THE COURT: Ladies and gentlemen, you must now decide what sentence is to be imposed upon the defendant, whether it be death or life imprisonment. In a very proper sence, you are not really making that decision. You are not deciding whether

he should be sentenced to death or life imprisonment. That was the law years ago and the Supreme Court of the United States declared such death penalties to be unconstitutional. I won't go into the reason. One of the theories was that it placed discretion on the jury. They could decide whether a particular individual could suffer death or life imprisonment. They have removed that burden from you. That is not what you are to decide. You are to decide whether there are certain aggravating circumstances or mitigating circumstances and depending upon how you find those circumstances,as I will explain to you, your decision follows. It must follow. If you find a certain way, a certain penalty must follow. That is the law. If, for example, as I will explain in a little more detail, you find unanimously beyond a reasonable doubt, that there is an aggravating circumstance and no mitigating circumstances or that the aggravating circumstance outweighs the mitigating circumstances, you must return a verdict of death. So the burden is not really yours. That is the law that you took an oath to uphold. If you do not, on the other hand, if you find that the mitigating circumstances outweigh the aggravating circumstances, or that there is no aggravating circumstances, then you must return a verdict of life imprisonment.

So you see, it is not really your decision in a sense. You decide, of course, the underlying factors but it is the way you decide those factors that the penalty is imposed. That

is the way the Supreme Court and our legislature have felt that they would remove that burden or that discretion from the jury.

It is up to you, of course, to find these mitigating or aggravating circumstances and to accord them whatever weight they should be give. Once you find a certain way, as I have just explained, the penalty follows.

The Crimes Code or the law provides for ten aggravating circumstances. Only one is applicable to this case. There are ten of them. I am not going to read the ten because they have nothing to do with this case, except one; that is, aggravating circumstances shall be limited to the following: number five, the victim, that would be Mr. Devesco, was a prosecution witness to a murder or other felony and it has been stipulated what the crimes were and they are felonies, most of them, committed by the defendant, and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceedings involving such offense.

The Commonwealth contends that that is the aggravating circumstance. You must be satisfied beyond a reasonable doubt, and I have explained to you that means the type of doubt that would cause a reasonably careful person to hesitate in acting in a matter of importance. It does not mean beyond all doubt. It is not something that you conjure up to avoid an unpleasant duty. It has to arise out of the evidence or lack of evidence but you must be satisfied beyond a reasonable doubt that there

is an aggravating circumstance.

That is not the end of it, of course. If you find that there is an aggravating circumstances beyond a reasonable doubt, then you consider whether or not there are mitigating circumstances to detract from this. There the burden is upon the defense. However, the burden is only the preponderance of the evidence. It is not as great a burden. It simply means the evidence in favor of the mitigating circumstances must outweigh every so slightly the evidence against it.

There are in the law -- well, there's an unlimited number. They list eight. They list seven and they say, any other evidence of mitigation concerning the character. Four of them may be applicable to this case, the others are not. They are one, that the defendant has no significant history of prior criminal convictions; two, he was under the influence of extreme mental or emotional distress;the third one, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired; four, the age of the defendant at the time of the crime and then this eighth one; any other evidence of mitigation, which would be the fifth one to consider, any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.

All of the evidence from both sides that you have heard earlier, of course, during the trial in chief, all of that which

has any bearing in your judgment upon aggravating or mitigating circumstances as I have mentioned them is important or proper for you to consider.

As I previously told you, as requested by counsel, it is entirely up to the defendant whether to testify and that would include, of course, the trial and this proceedings, too, and you must not draw any adverse inference from his silence.

The verdict, of course, must be unanimous. Again, if you find unanimously, beyond a reasonable doubt, the aggravating circumstance that I have mentioned, the only one that's applicable, that the victim was a prosecution witness to a felony and it was committed and he was murdered so that he would not testify, that is an aggravating circumstance. If you find that aggravating circumstance and find no mitigating circumstances or if you find that the aggravating circumstance which I mentioned to you outweighs any mitigating circumstance you find, your verdict must be the death penalty. If, on the other hand, you find that the Commonwealth has not proven an aggravating circumstance beyond a reasonable doubt or if they have, that the mitigating circumstances outweight the aggravating circumstances, then you must bring in a verdict of life imprisonment.

Anything further?

MR. TARMAN: I have some exceptions to the record, Your Honor.

THE COURT: I might say while they are coming up that

the verdict slip, the law does not say whether the same person would be the foreman. I don't know that that makes any difference. I suppose you could select a new foreman or forelady. The foreman or forelady is merely someone who has to bring in the verdict. The verdict slip, I have death or life imprisonment; you check whatever it is. If you sentence him to death, then you have to give us the reason. There's two possibilities; you check which one. One aggravating circumstance and no mitigating; then you must list the aggravating circumstance, the killing of a witness to a felony, or you may check, aggravating circumstance outweighs the mitigating circumstance. Again, you indicate what the aggravating circumstance is and in this case, there is only one aggravating circumstance in issue.

All right. Now, what is it?

(Whereupon, the following occurred at side bar:)

MR. TARMAN: First of all, towards the end of your charge, you indicated that the mitigating circumstances have to outweigh the aggravating circumstances in order to find life; in other words, you said if you find an aggravating circumstance, you have to then find that the mitigating circumstances outweigh it. That's not the law. The law doesn't say that.

THE COURT: It says the aggravating outweighs the mitigating doesn't it?

MR. TARMAN: Only if they find -- here is what I wanted you to do. Your statement on the law was, if you find that there

an aggravating circumstance, you must find that the mitigating circumstances outweigh that in order to find life. That's what I am objecting to.

THE COURT: Isn't that what the law is? What is it?

MR. TARMAN: It says, or if the jury unanimously finds one or more aggravating circumstances which outweight any mitigating circumstances, that's under subsection four.

MR. LEWIS: It's silent on the part you mention.

MR. TARMAN: You are creating a different burden. You are saying the mitigating has to outweight the aggravating. To my thinking, if it was fifty-fifty, they have to come back with life. The law says the aggravating has to outweight the mitigating. It never says the mitigating has to outweight the aggravating.

THE COURT: I will repeat it.

MR. TARMAN: I think it is very important. I don't think it was made clear that the mitigating only have to be proven by the preponderance of the evidence.

MR. LEWIS: That was stated.

THE COURT: And I explained what preponderance was. I will do it again.

MR. TARMAN: I would like you to indicate, I mentioned it in my remarks, I would like you to charge the jury upon the fact that the District Attorney has stipulated to the first mitigating circumstance.

MR. LEWIS: We have only stipulated there was no prior

penalty must be death.

(Whereupon, the following occurred at side bar:)

MR. TARMAN: I am requesting that they specifically be told that the mitigating does not have to outweigh the aggravating. They were already told the previous.

THE COURT: You have an exception.

MR. TARMAN: May I put on one other statement? I would take a general exception to the charge in that I don't think they should have to have it explained to them about the prior law on the death penalty, the fact that that burden has been taken from them.

THE COURT: All right.

(Whereupon, the discussion at side bar was concluded.)

THE COURT: Ladies and gentlemen, you will retire now and consider your verdict.

(Whereupon, the jury was escorted from the courtroom and Court was recessed at 2:34 o'clock p.m., and reconvened at 5:25 o'clock p.m.)

THE COURT: Ladies and gentlemen of the jury, have you agreed upon a verdict?

THE FOREMAN: We have, Your Honor.

THE COURT: Would you hand the verdict slip to the clerk, please? There will be no reaction in the courtroom to the verdict. I want no reaction.

THE CLERK: Will the foreman of the jury please rise?

record, not that there is no criminal record.

MR. TARMAN: He has no criminal record. Aren't you stipulating to the mitigating circumstances?

MR. LEWIS: We are saying there is no prior record.

MR. TARMAN: The defendant has no significant history of prior criminal convictions. Aren't you stipulating to that by saying he has no record?

MR. LEWIS: We are indicating that he has no significant history of prior criminal convictions.

MR. TARMAN: That's a stipulation.

THE COURT: I will try again.

(Whereupon, the discussion at side bar was concluded.)

THE COURT: I will try to summarize it, ladies and gentlemen. I don't want to get anybody mixed up on a matter of semantics. Under the law, as I said, you are obligated by your oath of office to fix the penalty at death if you unanimously agree and find beyond a reasonable doubt that there is an aggravating circumstances and either no mitigating circumstance or that the aggravating circumstance outweighs any mitigating circumstances. Now, there has been evidence from which you could find mitigating circumstances. In fact, the one mitigating circumstance is agreed to, that he has no significant history of prior criminal convictions, but what you have to decide is whether the aggravating circumstance, if you find such, outweighs any mitigating and if it does, then your

Opposition

IN THE

SUPREME COURT OF THE UNITED STATES

No. 82-6514

KEITH ZETTLEMOYER,
Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

Respondent's Brief In Opposition To Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania.

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STATEMENT OF THE CASE

In the early morning hours of October 13, 1980, the body of Charles DeVetsco was discovered in a trash dump along a secluded, unlit portion of Industrial Road, Harrisburg, Dauphin County, Pennsylvania. The Petitioner, Keith Zettlemoyer, was arrested at the scene as he emerged from the brush with the weapon still in his hand; a .357 magnum Smith & Wesson revolver. It was later determined by investigation that DeVetsco was to be a witness for the prosecution against Zettlemoyer at trials in Snyder County, Pennsylvania, involving multiple felony charges. (N.T. Trial 530-532.) The victim had been shot four times, twice in the neck with a .22 caliber weapon and twice in the back with the .357 magnum which was in the Petitioner's hand. The victim had been shot with a .22 caliber weapon while in the Petitioner's van (as indicated by several blood-soaked items, two spent .22 caliber bullet casings, and the weapon, all found in the van at the scene), handcuffed, and dragged from the van into the bushes where the fatal shots were fired (as indicated by drag marks and blood drippings). When the Petitioner emerged from the bushes, he was dressed in dark clothing, wearing dark gloves, and was heavily armed. Found on his person by officers of the Harrisburg Police Department, who had quickly arrived on the scene, as well as by Con ail officers, were a hunting knife, forty-one rounds of semi-jacketed hollow point .357 magnum ammunition, a shoulder holster, a tear gas cannister, a penlight and two handcuff keys. All of the victim's wounds were consistent

with the shooting having been done while the victim was lying face down. The cause of death was massive hemorrhaging of the heart which had been penetrated by the .357 magnum bullets.

The Petitioner was charged with criminal homicide on October 13, 1980. He was formally arraigned on January 21, 1981, and trial commenced in the Dauphin County Court of Common Pleas on April 20, 1981. The Petitioner conceded general criminal liability, but put forth a defense of diminished capacity in an attempt to reduce the crime from first to third degree murder. On April 24, 1981, the jury convicted the Petitioner of first degree murder.

In conformity with Pennsylvania's death penalty provisions, providing for bifurcated proceedings in cases where a first degree murder conviction is obtained, the Commonwealth and the Petitioner presented evidence after the finding of guilt concerning the existence of any mitigating or aggravating circumstances, and argument relative to the sentence to be imposed by the jury. Incorporated from the trial was the testimony of the Snyder County Clerk of Courts that the Petitioner was scheduled to be tried in Snyder County on various felony charges eight (8) days after he murdered DeVetsco. Additionally, excerpts of certified transcripts of the jury selection proceedings for Petitioner's pending Snyder County trials were read into the record, disclosing that DeVetsco was to be a witness at Petitioner's trial. (N.T. Trial 530-532.) The Petitioner was present at those proceedings. The jury was then informed by the Commonwealth of the various felony

charges pending against the Petitioner; robbery, burglary, kidnapping, criminal conspiracy and felony theft. All of the above evidence was offered to establish the existence of one aggravating circumstance: that the victim was a prosecution witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the Petitioner at criminal proceedings involving such offenses.

After receiving the Petitioner's evidence regarding mitigating circumstances, the court instructed the jury that the Commonwealth had to establish the existence of the aggravating circumstance beyond a reasonable doubt, while the defense only had to establish the existence of mitigating circumstances by a preponderance of the evidence. (N.T. Sentencing 33,36.) The court also informed the jury, in accordance with the applicable statutory provisions, that a sentence of death could only be returned in two situations: 1) if there was an aggravating circumstance and no mitigating circumstances, or 2) if the aggravating circumstance outweighed any mitigating circumstances. (N.T. Sentencing 33, 36, 39.) Additionally, the court instructed the jury that the sentence had to be life imprisonment if they found the mitigating circumstances outweighed the aggravating circumstance. To further clarify his instructions, and to ensure the jury was aware of the only two instances that would justify the imposition of the death penalty, the court

instructed the jury as follows:

> "I will try to summarize it, ladies and gentlemen. I don't want to get anybody mixed up on a matter of semantics. Under the law, as I said, you are obligated by your oath of office to fix the penalty at death if you unanimously agree and find beyond a reasonable doubt that there is an aggravating circumstance and either no mitigating circumstances or that the aggravating circumstance outweighs any mitigating circumstances. Now, there has been evidence from which you could find mitigating circumstances. In fact, the one mitigating circumstance is agreed to, that he has no significant history of prior criminal convictions, but what you have to decide is whether the aggravating circumstance, if you find such, outweighs any mitigating and if it does, then your penalty must be death."

(N.T. Sentencing at 39.)

Finally, the verdict slip itself contained the written provisions that death could be imposed only if the aggravating circumstance outweighed any mitigating circumstances, or if there was found to be an aggravating circumstance and no mitigating circumstances.

After receiving the above instructions and being told to weigh the aggravating and mitigating circumstances, the jury retired to deliberate and subsequently returned a sentence of death. The jury specifically found that the aggravating circumstance outweighed the mitigating circumstances.

Post-trial motions were filed, briefed, argued and denied. On October 21, 1981, the sentence of death was formally imposed.

A direct appeal was taken to the Pennsylvania Supreme Court which, on December 30, 1982, affirmed the conviction and

sentence of death.[1] In so doing, the Court concluded that the Commonwealth proved the existence of the aggravating circumstance beyond a reasonable doubt;[2] that the term "witness to a murder or other felony," as provided in the sole aggravating circumstance, is not restricted to eyewitnesses; that Pennsylvania's sentencing provisions instructing the jury to determine whether aggravating circumstances outweigh mitigating circumstances are constitutional in light of prior decision by this Honorable Court;[3] and that the trial court's instructions to the jury relative to aggravating and mitigating circumstances were not improper.[4] Finally, the Pennsylvania Supreme Court conducted a review of all cases decided subsequent to September 13, 1978, the effective date of Pennsylvania's present death penalty act and concluded that the sentence of death in this case was neither excessive nor disproportionate to the circumstances.

A Petition for Reargument was filed with the Pennsylvania Supreme Court and denied on February 7, 1983.

On April 7, 1983, the instant Petition for Writ of Certiorari to the Supreme Court of Pennsylvania was received by the Respondent, Commonwealth of Pennsylvania.

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[1]The court was unanimous in concluding the evidence was sufficient to sustain the conviction for first degree murder. The court split 4-3, however, in affirming the sentence of death.

[2]Justice Roberts (now Chief Justice) dissented on this point with former Chief Justice O'Brien joining.

[3]Justice Nix dissented on this issue.

[4]Justice Nix dissented on this issue.

SUMMARY OF ARGUMENT

The Commonwealth presented evidence at Petitioner's trial and at the sentencing hearing which showed that the victim was to be a witness on behalf of the prosecution against the Petitioner in felony criminal trials in Snyder County, Pennsylvania. One week after the victim's name was announced in open court, in the Petitioner's presence, as a Commonwealth witness, and one week prior to the commencement of said trials, the Petitioner handcuffed and shot the victim to death in execution-like fashion in a secluded area of Harrisburg, Pennsylvania, used primarily for trash dumping. All of the above, when viewed in light of the total absence of evidence to the contrary, established beyond a reasonable doubt that the victim was killed to prevent his testimony at Petitioner's upcoming felony trials, which is a statutory aggravating circumstance under Pennsylvania's Sentencing Code.

The Pennsylvania Supreme Court properly refused to restrict the phrase "witness to a murder or other felony," found in the applicable aggravating circumstance in Petitioner's case, beyond its common sense meaning to the unrealistically narrow interpretation sought by the Petitioner of only eyewitnesses. The court also properly found the aggravating circumstance, providing that the victim is killed to prevent his testimony at a criminal proceeding, does not require proof at the sentencing hearing that the Petitioner actually committed the underlying felony offenses.

Pennsylvania's death penalty provisions, providing that the jury must determine whether aggravating circumstances outweigh mitigating circumstances, are constitutionally sound. Pennsylvania's statutory scheme in this regard was implicitly recognized as such by this Honorable Court's decision in Proffitt v. Florida, infra, wherein Florida's similar statutory provisions were scrutinized and approved.

The trial court repeatedly instructed the jury that a sentence of death could be imposed in only two situations; 1) if the aggravating circumstance outweighed any mitigating circumstances, or 2) if there was an aggravating circumstance and no mitigating circumstances. The court's explanation to the jury that a verdict of death could not be imposed if the mitigating circumstances outweighed any aggravating circumstance was not incorrect. The jury's specific finding that the aggravating circumstance outweighed the mitigating circumstances belies Petitioner's claim of error.

The Pennsylvania Supreme Court properly discharged its statutorily mandated review of the Petitioner's sentence of death to determine whether the sentence imposed was proportionate to that imposed in similar cases. Petitioner makes no claim that the sentence is excessive, nor does he point to any specific deficiency in the court's reviewing procedure. That the court's review of all cases decided since the enactment of the death penalty provisions on September 13, 1978 should disclose only one other case with which to compare the Petitioner's case does not support the Petitioner's claim of error as the death penalty was the verdict of the jurors in the comparison case. The uniqueness of the controlling

aggravating circumstance is responsible for the lack of comparable cases, not any deficiency in the court's reviewing procedure.

ARGUMENT

I. THE COMMONWEALTH PROVED BEYOND A REASONABLE DOUBT THE EXISTENCE OF ONE AGGRAVATING CIRCUMSTANCE.

Pennsylvania's Sentencing Code, Act of March 26, 1974, P.L. 213, No. 46, as amended Act of December 30, 1974, P.L. 1052, No. 345; Act of September 13, 1978, P.L. 756, No. 141; Act of October 5, 1980, P.L. 693, No. 142 (42 Pa.C.S. §9701 et seq.) provides for the imposition of the penalty of death in cases of first degree murder, Act of December 7, 1972, P.L. 1482, No. 334, as amended Act of March 26, 1974, P.L. 213, No. 46; Act of April 28, 1978, P.L. 84, No. 39 (18 Pa.C.S. §2502). A predicate for the imposition of the death penalty is the existence of one or more aggravating circumstances, which must be proven to a jury beyond a reasonable doubt. (42 Pa.C.S. §§9711(d) (1-10); §9711(c)(1)(iii)). In the case sub judice, the Commonwealth sought to prove the existence of one (1) aggravating circumstance, statutorily defined as follows:

> The victim was a prosecution witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceeding involving such offenses.

42 Pa.C.S. §9711(d)(5).

In proving the existence of the aggravating circumstance, the Commonwealth presented evidence at the sentencing hearing that the Petitioner had been indicted by the grand jury of Snyder County, Pennsylvania, on May 26, 1980, on felony charges of criminal conspiracy, burglary, robbery, kidnapping,

and theft. It was stipulated by the Petitioner that these charges were pending at the time the Petitioner murdered DeVetsco on October 13, 1980. (N.T. Sentencing Hearing 4.) At the time of the sentencing hearing, the Petitioner had actually been convicted of several of these charges. (N.T. Sentencing Hearing 12.) Incorporated at the sentencing hearing was the testimony presented at trial, to the same jury, of Richard G. Schuck, Prothonotary and Clerk of Courts of Snyder County, Pennsylvania. Through Schuck, the Commonwealth presented as evidence certified records of the criminal case in Snyder County, indexed to No. 95 of 1980, and encaptioned Commonwealth v. Keith William Zettlemoyer. (N.T. Trial 530.) As indicated earlier, indictments were returned against Petitioner, and trial on those matters was scheduled for October 21, 1980, approximately eight (8) days after Petitioner murdered DeVetsco. A jury had been selected in Snyder County Court of Common Pleas on October 6, 1980, at proceedings where the Petitioner was present. (N.T. Trial 531, 532.) At those proceedings, the jury and the Petitioner were informed of the witnesses to be used at trial by the Commonwealth against the Petitioner. One of those so named in open court was the victim, Charles DeVetsco. (N.T. Trial 532.)

With the above testimony already presented to the jury at trial, and stipulated to by Petitioner's counsel, the District Attorney informed the court that, at counsel's request, he checked with the Snyder County District Attorney's office to learn if Mr. DeVetsco had been subpoenaed. Mr. John Robinson, District Attorney of Snyder County, informed the

District Attorney that DeVetsco could not be subpoenaed because the Petitioner had murdered him before he could be served. (N.T. Sentencing 4.) The District Attorney then presented evidence to show that the Petitioner was to be tried in Snyder County for various felony offenses. Therefore, the court and jury were presented with evidence by the Commonwealth that:

1. The Petitioner was to be tried on October 21, 1980, in Snyder County for multiple felony charges;

2. The District Attorney of Snyder County intended to use Charles DeVetsco as a witness at those trials;

3. The Petitioner was present at the jury selection on October 13, 1980, when the name of Charles DeVetsco, a fellow employee of the Petitioner, was announced as a witness against him in the upcoming trials; and,

4. Charles DeVetsco was murdered by the Petitioner one (1) week before testimony in the felony trials in Snyder County was to commence.

The Petitioner's attorney objected, prior to the trial court's instructions to the jury pursuant to Pa.C.S. §9711(c), to the sufficiency of the evidence presented by the Commonwealth as to the aggravating circumstance. (N.T. Sentencing Hearing 10.) There were only two (2) grounds advanced: 1) that the victim was not a subpoenaed witness, and 2) that Pa.C.S. §9711(d)(5) applied only to "eyewitnesses" to murder or other felonies. The court rejected these arguments, Petitioner's counsel presented testimony and stipulations as to the existence of mitigating circumstances, and the jury was instructed pursuant to Pa.C.S. §9711(c).

Justice Larsen, speaking for the majority of the Pennsylvania Supreme Court, discussed the Petitioner's claim of deficiency in the proof tendered by the Commonwealth and rejected it:

> All of the evidence at trial and at the sentencing hearing raised the singular inference that the killing was motivated by Petitioner's desire to prevent the victim from testifying in the Snyder County criminal proceedings. Not one iota of evidence can be read to raise an inference of another purpose--surely not the testimony of Petitioner's mother that at one time Petitioner and the victim were "friends." In the absence of a confession or admission by the actor, purpose and intention will, of necessity, require proof by circumstantial evidence and inferences therefrom. E.g. Commonwealth v. O'Searo, 466 Pa. 224, 352 A.2d 30, 35-38 (1976) (Specific intent to kill may be inferred by the use of deadly weapon directed at vital parts of body.) The Commonwealth is not required to negate every conceivable inference within the endless realm of human speculation that is consistent with innocence. See e.g., Commonwealth v. Williams, 476 Pa. 557, 383 A.2d 503, 507 (1978) and Commonwealth v. Sullivan, 472 Pa. 129, 371 A.2d 468, 479 (1977). The circumstantial evidence presented by the Commonwealth overwhelmingly, and beyond a reasonable doubt, supports the jury's finding that the Petitioner shot and killed Mr. DeVetsco in order to prevent him from testifying in the felony proceedings in Snyder County.

Commonwealth v. Zettlemoyer, ___ Pa. ___, 454 A.2d at 951-52.

By his claims, Petitioner would require the Commonwealth to meet the intolerable burden of "proof beyond all doubt." This is clearly not the required standard of proof. Measuring the quantum of proof presented by the Commonwealth against the proper standard of "beyond a reasonable doubt," especially in light of the total vacuity of evidence presented by the Petitioner, in argument or otherwise, to suggest some other motive for DeVetsco's slaying, it is clear the burden of proof as to the existence of the aggravating circumstance was carried.

II. THE INTERPRETATION GIVEN BY THE PENNSYLVANIA SUPREME COURT TO THE LANGUAGE OF THE ONLY APPLICABLE AGGRAVATING CIRCUMSTANCE COMPORTS WITH THE INTENT OF THE LEGISLATURE AND DUE PROCESS OF LAW.

The Petitioner seeks to avoid the imposition of the death penalty by bludgeoning the clear meaning of the phrases "witness to a murder or other felony" and "committed by the defendant," found in the sole aggravating circumstance present, with a cudgel of unrealistic interpretation and tortuous statutory construction. Such an assault on the clear, unambiguous meaning of the statute was rightly rejected by the Pennsylvania Supreme Court.

The Petitioner maintains that the phrase "witness to a murder or other felony" as used in the aggravating circumstance must be interpreted to mean "eyewitness," to the exclusion of all others. Similar to this attempted metamorphosing of that unambiguous provision, the Petitioner would require the Commonwealth, pursuant to his interpretation of the phrase "committed by," to prove at the sentencing hearing that a defendant actually committed the crimes, that is, to try the underlying offenses at the sentencing hearing.

When attempting to determine what interpretation should be given a particular statutory provision, certain presumptions govern, one of which is that the "General Assembly does not intend a result that is absurd, impossible of execution or unreasonable." Statutory Construction Act of December 6, 1972, P.L. 1339, No. 290, 1 Pa.C.S. §1922(1). Furthermore, while a defendant is to receive the benefit of the doubt where there are two inconsistent interpretations of the language of a penal statute, Commonwealth v. Teada, 235 Pa.Super. 438, 344 A.2d 682 (1975), the inconsistent interpretation must be

grounded in reason and construed in light of 1 Pa.C.S. §1922(1).

The Petitioner seeks to inject an artificial distinction into 42 Pa.C.S. §9711(d)(5) where none was intended. Furthermore, Petitioner's interpretation of "witness to" to mean exclusively eyewitnesses, is an unrealistically narrow and strained interpretation, for it excludes from consideration expert witnesses, witnesses to whom a defendant may have confessed, witnesses who may have testimony to provide to refute a defendant's alibi, and others. All are clearly critical witnesses to the obtaining of a conviction. The elimination of a witness, any witness, in a criminal trial against a defendant is an attack upon the very foundation of our criminal justice system, meriting inclusion in the list of aggravating circumstances for which a sentence of death may be imposed. As the majority correctly noted, "[t]he damage to the system is equally severe whether the executed witness be the relatively rare (in such cases) eyewitness or otherwise." Commonwealth v. Zettlemoyer, ___ Pa. ___, 454 A.2d at p. 952.

Equally devoid of merit is the Petitioner's claim that the Commonwealth must prove at the sentencing hearing that the Petitioner actually committed the underlying felonies.

A common sense reading of 42 Pa.C.S. §9711(d)(5) clearly demonstrates the legislature intended that the individual who is slain would have been a witness in a proceeding yet to come. It is the slaying of a witness who would testify in those proceedings to prove the defendant committed a murder or other felony that constitutes the aggravating circumstance.

Illustrative of the illogic of the Petitioner's contention is a situation where a defendant slays a key witness against him in a pending felony trial, necessitating the dropping of the murder or other felony charges. To pursue the Petitioner's sophistical argument would mean that the legislature intended a defendant to reap a windfall in such circumstances; not only would the felony charges be dismissed, but the defendant could not be put to death since it could never be proven that the defendant committed the felonies, for by his vile act he prevented the Commonwealth from pursuing the charges. Such an absurd result could not have been intended by the legislature. Indeed, the very langauge of 42 Pa.C.S. §9711(d)(5), stating that the witness was killed to prevent his testimony, demonstrates a decided lack of support for the Petitioner's claim in this regard.

The Commonwealth proved the Petitioner was scheduled for trial on multiple felony charges a week after he murdered Charles DeVetsco, a witness against him. This was clearly sufficient as the statute neither contemplates that the Commonwealth would have to try the felony charges at the sentencing stage, nor delay its trial for DeVetsco's murder until a conviction on the other felony charges was obtained. Thus, the interpretation given by the Pennsylvania Supreme Court to the aggravating circumstance in 42 Pa.C.S. §9711(d)(5) was proper and did not deny the Petitioner due process of law.

III. PENNSYLVANIA'S DEATH PENALTY PROVISIONS, WHICH REQUIRE THE JURY TO DETERMINE WHETHER AGGRAVATING CIRCUMSTANCES OUTWEIGH MITIGATING CIRCUMSTANCES, COMPORT WITH REQUIREMENTS OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Prior to the jury retiring to deliberate on the appropriate penalty to be imposed, the court is required to instruct the jury on the following matters:

> 1. the aggravating circumstances . . .
>
> 2. the mitigating circumstances . . .
>
> 3. aggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt; mitigating circumstances must be proved by the defendant by a preponderance of the evidence.
>
> 4. the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life in all other cases.

42 Pa.C.S. §9711(c)(1)(i)-(iv).

The Petitioner claims that these provisions are fatally flawed and, therefore, cannot pass constitutional muster. This is premised on the belief that the provisions requiring the jury to find aggravating circumstances "outweigh" mitigating circumstances, without providing the jury with a standard to guide it in the weighing process, are insufficient. It is respectfully submitted that this claim is without merit.

In Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), this Honorable Court, in invalidating Georgia's death penalty law, held that the Eighth and Fourteenth Amendments to the United States Constitution prohibit the

imposition of the death penalty in an arbitrary or capricious manner. However, in a quintet of decisions rendered on the same day in 1976, Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); and Roberts v. Louisiana, 428 U.S. 325 (1976), this Honorable Court held that the death penalty does not inveriably violate the Eighth and Fourteenth Amendments. Where the discretion of a sentencing body in capital cases is carefully channeled by standards designed and applied to insure that the death penalty is not applied in an arbitrary or capricious manner, then the protections of the Eighth and Fourteenth Amendments are not transgressed.

In Pennsylvania's death penalty provisions, the jury is asked to determine whether aggravating circumstances outweigh any mitigating circumstances. 42 Pa.C.S. §9711(c)(1)(iv). Such a statutory provision was held constitutionally sound by this Honorable Court in Proffitt v. Florida, supra. In Proffitt, this Honorable Court scrutinized Florida's capital sentencing statute. Fla. Stat. Ann. §921-141. Much the same as in Pennsylvania, if a defendant is convicted of a capital offense in Florida, a separate hearing is convened to receive evidence relating to statutorily established aggravating and mitigating circumstances. Argument may be presented by the prosecutor and the defendant's attorney. At the conclusion of the hearing, the jury is directed to consider "[w]hether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and . . . [b]ased on these considerations, whether the defendant

should be sentenced to life [imprisonment] or death." Fla. Stat. Ann. §921-141(2)(b) and (c) (Supp. 1976-1977) (emphasis added.) The jury then recommends to the trial judge the sentence to be imposed. The trial judge then engages in the same "weighing" process, and, if the trial judge finds that there are no mitigating circumstances which outweigh the aggravating circumstances, the appropriate sentence is imposed. Fla. Stat. Ann. §921-141(3) (Supp. 1976-1977.)

This Honorable Court found Florida's death penalty statute to be constitutionally sound and held that it "satisfies the constitutional deficiencies in Furman." Proffitt v. Florida, 242 U.S. at 253. Of importance in that conclusion was Florida's appellate review system, under which the appellate courts would weigh the aggravating and mitigating circumstances to determine independently whether the imposition of the death penalty was warranted. Pennsylvania provides a similar appellate safety net:

> (h) Review of death sentence-
> (1) A sentence of death shall be subject to automatic review by the Supreme Court of Pennsylvania pursuant to its rules.
> (2) In addition to its authority to correct errors at trial, the Supreme Court shall either affirm the sentence of death or vacate the sentence of death and remand for the imposition of a life imprisonment sentence.
> (3) The Supreme Court shall affirm the sentence of death unless it determines that:
> (i) the sentence of death was the product of passion, prejudice or any other arbitrary factor;
> (ii) the evidence fails to support the finding of an aggravating circumstance specified in subsection (d); or
> (iii) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases,

> considering both the circumstances of the crime and the character and record of the defendant.

42 Pa.C.S. §9711(h).

Petitioner's reliance on In re Winship, 397 U.S. 358 (1970) is misplaced as is evident from this Honorable Court's decision in Patterson v. New York, 432 U.S. 197 (1977). Equally lacking in support is the Petitioner's reliance upon the decision in State v. Wood, 648 P.2d 71 (Utah, 1982), as that Court made it abundantly clear its decision to require a reasonable doubt standard to control the weighing process was "decided on the preferred grounds of statutory construction." State v. Wood, 648 P.2d at 82. Finally, the United States Court of Appeals for the Eleventh Circuit has recently reached the same conclusion in passing on Florida's death penalty procedural statute. Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983). Consequently, Petitioner's objections in this regard are meritless.

IV. THE TRIAL COURT'S INSTRUCTIONS TO THE JURY WERE ACCURATE AND COMPLETE AND NOT VIOLATIVE OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The Sentencing Code provides that the trial judge shall instruct the jury on the following matters:

> (1) Before the jury retires to consider the sentencing verdict, the court shall instruct the jury on the following matters:
>
> (i) the aggravating circumstances specified in subsection (d) as to which there is some evidence.
>
> (ii) the mitigating circumstances specified in subsection (e) as to which there is some evidence.
>
> (iii) aggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt; mitigating circumstances must be proved by the defendant by a preponderance of the evidence.
>
> (iv) the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.

42 Pa.C.S. §9711(c).

Additionally, the court shall instruct the jury on any other matter that it deems just and proper under the circumstances.

When instructing the jury, the court complied with the statutory requirements by informing the jury that the only possible way that they could return a sentence of death would be if the Commonwealth proved beyond a reasonable doubt, and the jury unanimously agreed, that there was an aggravating circumstance and no mitigating circumstances, or that the aggravating circumstances outweighed any mitigating circumstances. (N.T. Sentencing Hearing at 33, 36, 39.)

The verdict slip that was given the jury was accompanied by the following instruction from the court:

> The verdict slip, I have death or life imprisonment; you check whatever it is. If you sentence him to death, then you have to give us the reason. There's two possibilities; you check which one. One aggravating circumstance and no mitigating; then you must list the aggravating circumstance, the killing of a witness to a felony, or you may check, aggravating circumstance outweighs the mitigating circumstance. Again, you indicate what the aggravating circumstance is and in this case, there is only one aggravating circumstance in issue.

(N.T. Sentencing Hearing at 37.)

Furthermore, the verdict slip itself, which accompanied the jury into the deliberation room, clearly and in writing instructed the jury that the death penalty could be imposed only if there was at least one aggravating circumstance and no mitigating circumstances, or if the aggravating circumstance outweighed the mitigating circumstances. Otherwise, the sentence had to be life imprisonment.

There is no requirement that the trial court read in rote fashion the provisions of 42 Pa.C.S. §9711(c). Rather, the court is charged with the responsibility of clarifying issues and explaining correctly to the jury in plain and understandable langauge the applicable law. Commonwealth v. Davidson, 743 Pa.Super. 12, 364 A.2d 425 (1976). Additionally, the trial court is free to select its own form of expression when instructing the jury, so long as the legal precepts are adequately, accurately and clearly presented to the jury. Commonwealth v. Gardner, 246 Pa.Super. 582, 371

A.2d 986 (1977); Commonwealth v. Lesher, 473 Pa. 141, 373 A.2d 1088 (1977).

The Petitioner would assign as error of constitutional magnitude the court's explanation to the jury that their verdict had to be life if the "mitigating circumstances outweighed the aggravating circumstance." (N.T. Sentencing Hearing at 33, 36.) Contrary to Petitioner's claim, this is an accurate statement of one of the "all other cases" situation in which a verdict of life imprisonment must be returned. 42 Pa.C.S. §9711(c)(1)(iv). This instruction placed no burden on the Petitioner. The burden was in proving the existence of mitigating circumstances. Petitioner's claim that the jury was instructed "that a life sentence could be imposed only if mitigating circumstances outweigh aggravating ones" (Petition for Writ of Certiorari at p. 19) (emphasis added), is clearly an inaccurate interpretation of the trial court's charge. The court's instruction that life imprisonment must be the verdict if the mitigating circumstances outweigh the aggravating is simply the complete converse of the instruction that death may not be imposed unless the aggravating outweigh the mitigating circumstances.

Finally, when the jury rendered its verdict of death, it made a specific finding of fact that renders nugatory the Petitioner's claim of misleading instructions and explanation. That specific finding of fact was that "the aggravating circumstance outweighs the mitigating circumstances." This clearly dispels any claim that the jury may have attributed equal weight to the aggravating and mitigating circumstances.

Consequently, the Petitioner's claims of error are unfounded and do not merit relief by this Honorable Court.

V. THE PENNSYLVANIA SUPREME COURT'S REVIEW OF THE SENTENCE OF DEATH IN THE PETITIONER'S CASE TO DETERMINE WHETHER IT IS EXCESSIVE OR DISPROPORTIONATE TO THE PENALTY IMPOSED IN SIMILAR CASES WAS CONSTITUTIONAL.

The Petitioner's final claim is that he was denied due process of law and equal protection under the law due to a purported failure of the Pennsylvania Supreme Court to engage in adequate and meaningful review of this sentence of death as compared to other defendants so situated.

Initially, it should be noted the Petitioner is not claiming that Pennsylvania's Sentencing Code, providing for automatic review by the Pennsylvania Supreme Court of cases where a sentence of death is imposed, 42 Pa.C.S. §9711(h), is constitutionally inadequate under Furman v. Georgia, supra. Nor does the Petitioner claim that the sentencing verdict of death was the product of passion, prejudice or any other arbitrary factor. 42 Pa.C.S. §9711(h)(3)(i). Rather, Petitioner claims that the Supreme Court of Pennsylvania failed to properly review the sentence of death to determine whether it is proportionate to the penalty imposed in similar cases. 42 Pa.C.S. §9711(h)(3)(iii). However, the Opinion of the majority of the Pennsylvania Supreme Court belies this claim, and the Commonwealth respectfully contends the claim is meritless.

In Gregg v. Georgia, supra., this Honorable Court, in upholding Georgia's death penalty statutes, found that Georgia's provision for appellate review served as "a check against the random or arbitrary imposition of the death penalty." Gregg v. Georgia, 428 U.S. at 206. This Honorable Court further noted that "[i]n particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to

die by the action of an aberrant jury." Gregg v. Georgia, 428 U.S. at 206. Upon review of the actions of Pennsylvania's highest court, it is apparent that, as did the Georgia Supreme Court, "the Supreme Court [of Pennsylvania] has taken its review responsibilities seriously." 428 U.S. at 205.

Justice Larsen, speaking for the majority, detailed the searching inquiry undertaken by the court to compare Petitioner's case with those of other defendants so situated. All cases decided since the effective date of the sentencing procedures involved in the Petitioner's case (September 13, 1978) were scrutinized. Furthermore, the Court's statutorily mandated review "utilize[d] all available judicial resources and. . . encompass[ed] all similar cases, taking into consideration both the circumstances of the crime and the character and record of the defendant in order to determine whether the sentence of death [was] excessive or disproportionate to the circumstances." Commonwealth v. Zettlemoyer, ___ Pa. ___, 454 A.2d at 961. (emphasis added) The court properly examined only those cases under the new death penalty provisions, spanning a period of over four (4) years prior to the court's decision, as cases prior to September 13, 1978 would be unreliable as barometers of death sentences in similar cases. Pennsylvania's prior death penalty provisions were ruled unconstitutional due to Furman deficiencies. See Commonwealth v. Bradley, 449 Pa. 19, 295 A.2d 842 (1972); Commonwealth v. Moody, 476 Pa. 223, 382 A.2d 442 (1977); Commonwealth v. McKenna, 476 Pa. 428, 383 A.2d 174 (1978). Thus, it would have been improper to consider such cases. But cf., Gregg v. Georgia, 482 U.S. at 204, fn. 56.

The court's exhaustive review revealed only one similar case to that of Petitioner's, i.e., where the aggravating circumstance involved the slaying of a prosecution witness to a murder or other felony to prevent the victim from testifying. The case is Commonwealth v. Mack Truesdale, Philadelphia County Court of Common Pleas, Criminal Division 7607-135-136, presently before the Pennsylvania Supreme Court, docketed there to No. 81-3-483. A sentence of death was imposed in Truesdale. Thus, the court properly concluded that "in Pennsylvania, the sentence of death for murder of the first degree involving the killing of a prosecution witness to a murder or other felony is not 'excessive or disproportionate to the sentence imposed in similar cases.'" Commonwealth v. Zettlemoyer, ___ Pa. ___, 454 A.2d at 962.

Petitioner bemoans the fact that there is only one other case with which to compare his. This is not surprising, due to the particularized nature of the aggravating circumstance involved; the murder of a prosecution witness to a murder or other felony, committed by the defendant, for the purpose of preventing his testimony at some future criminal proceeding. 42 Pa.C.S. §9711(d)(5). Petitioner cannot escape the verdict of death, properly and justifiably returned by a jury of his peers, simply because he and Truesdale find themselves in such exclusive company. Fortunately, for the citizens of this Commonwealth, there are not a large number of cases to contrast with the Petitioner's case. The Supreme Court of Pennsylvania cannot be faulted if its wide-ranging review should uncover only one other case for comparison as long as the review conducted was proper. Petitioner's

complaints center exclusively on the result of the review, rather than pointing to any specific defect in the method undertaken. The Petitioner does not offer even the slightest suggestion as to why the review undertaken was improper.

Finally, it should be noted that the Petitioner makes no claim to this Honorable Court that the sentence of death imposed in his case is in fact excessive or disproportionate, nor was this claim made to the trial court or the Supreme Court of Pennsylvania. Consequently, the Petitioner's claims in this regard are without merit.

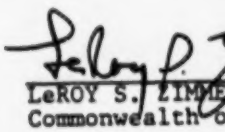
CONCLUSION

A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted by this Honorable Court only when there are special and important reasons therefor.

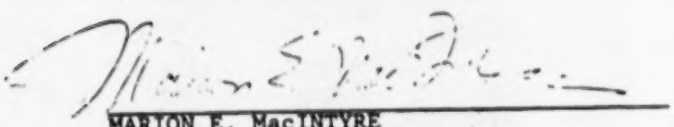
The decision by the Pennsylvania Supreme Court, affirming the Petitioner's sentence of death, does not conflict with the decisions of any federal court of appeals and is in harmony with previous applicable decisions of this Honorable Court.

WHEREFORE, the Commonwealth respectfully requests this Honorable Court to deny the Petition for Writ of Certiorari to the Supreme Court of Pennsylvania.

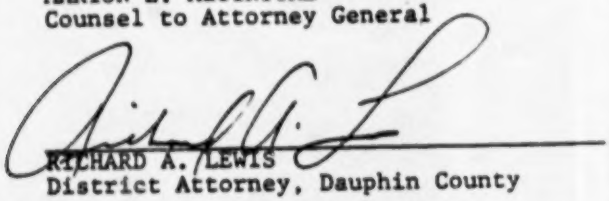
Respectfully submitted,



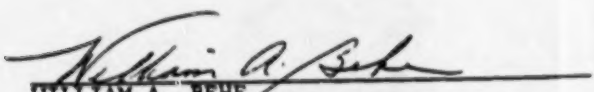
LeROY S. ZIMMERMAN, Attorney General
Commonwealth of Pennsylvania



MARION E. MacINTYRE
Counsel to Attorney General



RICHARD A. LEWIS
District Attorney, Dauphin County



WILLIAM A. BEHE
Deputy Attorney General

Appendix

18 Pa.C.S. § 2502

§ 2502. Murder

(a) Murder of the first degree.—A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing.

(b) Murder of the second degree.—A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony.

(c) Murder of the third degree.—All other kinds of murder shall be murder of the third degree. Murder of the third degree is a felony of the first degree.

(d) Definitions.—As used in this section the following words and phrases shall have the meanings given to them in this subsection:

"Fireman." Includes any employee or member of a municipal fire department or volunteer fire company.

"Hijacking." Any unlawful or unauthorized seizure or exercise of control, by force or violence or threat of force or violence.

"Intentional killing." Killing by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing.

"Perpetration of a felony." The act of the defendant in engaging in or being an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.

"Principal." A person who is the actor or perpetrator of the crime.

as amended 1974, March 26, P.L. 213, No. 46, § 4, imd. effective; 1978, April 28, P.L. 84, No. 39, § 1, effective in 60 days.

mind free. Do not read any newspaper accounts of the story. All right. Thank you.

(Whereupon court was adjourned at 3:30 o'clock p.m. and reconvened on Thursday, April 23, 1981, at 9:38 o'clock a.m.)

RICHARD G. SCHUCK, called as a witness, being first duly sworn, according to law, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LEWIS:

Q Could we have your full name, please?

A My name is Richard G. Schuck.

Q And what is your occupation?

A Prothonotary and Clerk of Courts of Snyder County.

Q How long have you been the Prothonotary and Clerk of Courts of Snyder County, Pennsylvania?

A I am currently serving my eighteenth year.

Q Mr. Schuck, regarding your duties as the clerk of courts, does that involve your keeping the official records of all criminal proceedings in Snyder County?

A Yes, sir.

Q Pursuant to my request did you bring with you today certain certified copies of court records of Snyder County?

A I did.

Q I am placing before you what has been marked for

identification as Commonwealth Exhibit No. 46 and I ask you if they are certified court records of a criminal case in Snyder County indexed to No. 95 of 1980 of Snyder County, Commonwealth of Pennsylvania versus Keith William Zettlemoyer, is that correct?

A Yes, sir.

Q And those criminal docket transcript records, I think included in there is a criminal complaint, is that correct?

A Yes, sir.

Q And an indictment, is that correct?

A An indictment.

Q Handed down by the Snyder County grand jury, I would assume?

A Yes.

Q Were those charges pending trial in Snyder County?

A Yes, sir.

Q And what was the date set for the trial? Is that October, I think, of 1980?

A The date set was October the 21st.

Q Of 1980?

A 1980.

THE COURT: October what?

THE WITNESS: 1980.

THE COURT: Was the trial date?

THE WITNESS: Yes, sir.

BY MR. LEWIS:

Q Now, Mr. Schuck, also I would like to show you another exhibit that has been marked as Commonwealth Exhibit No. 45 and ask you if that is a partial transcript of some of the court proceedings during the jury selection pursuant to those criminal papers you have just identified?

A Yes, sir.

Q And the jury selection for that case was held, what was the date?

A October the 6th.

Q On October 6, 1980, is that correct?

A That is correct.

Q And that also concerns itself with the Commonwealth of Pennsylvania versus Keith William Zettlemoyer, 95 of 1980 in Snyder County?

A Yes, sir.

Q Now, I would refer you to page two of that transcript and ask if you would simply read that page aloud to His Honor and the ladies and gentlemen of the jury.

A This matter came on to be heard before the Honorable A. Thomas Wilson, President Judge in Courtroom No. 1 at the Courthouse in Middleburg, Snyder County, Pennsylvania, on Monday, October the 6th, 1980, beginning at 1:50 p.m. at which time and place the following partial proceedings were had. "By Mr. Robert Hinson, District Attorney of Snyder County, the

Commonwealth would expect to call the following names of people in testimony: Trooper Jimmy Fisher, Pennsylvania State Police, Trooper Harlan Harker, Pennsylvania State Police, Burt Seckler, who is an employee of Radio Shack in the Susquehanna Valley Mall, Charles Spotts from the Selinsgrove area, Keith Kipple from the Sunbury area and Charles DeVetsco from the Selinsgrove Sunbury area. There may be other witnesses."

Q Now, this was taken down by the official court reporter similar to the young lady seated here in our courtroom today, is that correct?

A Yes, sir.

Q This was during the jury selection in Snyder County?

A Jury selection, yes.

Q For the trial that you said was going to be held on October 21st, I think is the date you gave, is that correct?

A Yes, sir.

Q And this transcript indicates that the Defendant, Mr. Zettlemoyer, was present at that time, is that correct?

A That is correct.

MR. LEWIS: I have no other questions of Mr. Schuck.

MR. TAMMAS: No questions, Your Honor.

THE COURT: In other words, you picked the jury the 6th and then there would be a delay of several weeks and the trial was going to start on the 21st?

THE WITNESS: We had set the date for the 21st,

yes, sir.

THE COURT: Thank you very much.

MR. LEWIS: Thank you, Mr. Schuck. Thank you very much for coming.

PAUL SCHWEDA, called as a witness, being first duly sworn, according to law, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LEWIS:

Q May we have your full name, please?

A Dr. Paul Schweda, S-C-H-W-E-D-A.

Q Doctor, how are you employed?

A I am employed by National Medical Services in Willow Grove, Pennsylvania.

Q And what kind of work do you do there, doctor?

A I am an associate director there and I am a toxicologist.

Q Doctor, first of all, tell us what you mean by a toxicologist?

A A toxicologist is a man who is knowledgeable about poisons in its widest meaning, what poisons are, what their actions are, how they can be encountered, how they can be found, analyzed and finally quantitated.

Q Dr. Schweda, could you tell the ladies and gentlemen of the jury your educational background in the field of

COMMONWEALTH OF PENNSYLVANIA : IN THE COURT OF COMMON PLEAS
DAUPHIN COUNTY, PENNSYLVANIA

v. :

KEITH ZETTLEMOYER : No. 1818 Criminal Division 1980

TRANSCRIPT OF PROCEEDINGS

SENTENCE

BEFORE: HON. JOHN C. DOWLING, JUDGE
And a jury

DATE: Friday, April 24, 1981

PLACE: Courtroom No. 5, Courthouse
Harrisburg, Pennsylvania

APPEARANCES:

RICHARD LEWIS, Esquire
District Attorney

For - Commonwealth

ROBERT TARIAN, Esquire

For - Defendant

- - - - -

THE COURT: Ladies and gentlemen, you have found the defendant guilty of murder in the first degree and your verdict has been recorded. We are now going to hold a sentencing hearing during which counsel, both defense and Commonwealth, if they wish, may present additional evidence and argument and then you will decide whether the defendant is to be sentenced to death or life imprisonment. Whether you sentence the defendant to death or life imprisonment will depend upon what, if any, aggravating or mitigating circumstances you find are present in the case and I will explain what those circumstances are, they are delineated by statute, before I ask you to deliberate.

Are we ready to present testimony at this time?

MR. FARMAN: Your Honor, I would request to approach the bench first before testimony is presented.

THE COURT: Very well.

(Whereupon, the following occurred at side bar:)

THE COURT: I will say this, the defense has requested the District Attorney to stipulate as to which aggravating circumstances he will be producing evidence of and Mr. Lewis, as I understand, it is number five?

MR. LEWIS: Yes, Your Honor, it would be 18 Purdon's Statutes 1311(d) 5.

THE COURT: That the victim was a witness in a felony proceedings?

MR. LEWIS: That's right, and our evidence --

THE COURT: That is the only point, that is the aggravating circumstance?

MR. LEWIS: Correct, yes,and our evidence will only be, and I think it has already been agreed to on stipulation, is the criminal charges that were pending. It's already been marked as Exhibit No. 46, the criminal complaint from the Clerk of Courts and simply I will state on the record that Mr. Tarman asked if I would check with the District Attorney of Snyder County, Mr. John Robinson, to see if Mr. Devesco was, indeed, subpoenaned. Mr. Robinson has informed me he was not subpoenaed because he was killed the week before he was scheduled to appear as a witness, and that is the basis of our offer.

MR. TARMAN: I will make objections after he presents his evidence. Then I have my objectios to the aggravating circumstance as to the sufficiency.

THE COURT: All right. Well, I will instruct the jury it was a felony. Do you know what he was charged with? What was it, burglary or robbery?

MR. LEWIS: It was conspiracy, two counts of burglary, one count of robbery, kidnapping, unlawful restraint, uniform firearms act violation, unauthorized use of a motor vehicle and receiving stolen property.

MR. TARMAN: I would object to the actual naming of those charges, especially in light of the fact that he has not

been convicted on all those charges that the District Attorney has related but, first of all, I would object to the naming the felony charges at all and especially in light of the fact that he was never, for instance, convicted on the kidnapping.

THE COURT: It is not the conviction. It is what was pending at the time.

MR. TARMAN: Yes. I am just objecting to actually naming them.

THE COURT: You can object. I think it is proper. Are you ready to present some evidence?

MR. TARMAN: He goes first, is that right?

THE COURT: That isn't going to take long.

MR. LEWIS: Are we agreeing I should read from the criminal complaint or the indictment? Do you have any preference? The criminal complaint summarizes it in one paragraph. The indictment is broken down.

THE COURT: Read the criminal complaint.

MR. TARMAN: Iwould object to the reading of the criminal complaint. I don't think the facts of the case have any bearing

MR. LEWIS: How about the indictment? I will read the indictment then.

MR. TARMAN: I object to the reading of the nature of the charges at all except to the fact that they were felonies I object to them actually naming them as robbery, burglary, kidnapping.

THE COURT: Objection overruled.

(Whereupon, the discussion at side bar was concluded.)

THE COURT: As I mentioned to you,ladies and gentlmen, we now hold a second hearing so that you can determine under instructions from the Court, what the penalty is to be and the Commonwealth will now present such evdience as it has as to the aggravating circumstances.

MR. LEWIS: Your Honor, the Commonwealth's evidence has been agreed to by stipulation and is as follows: that the grand jury of Snyder County, Pennsylvania, in reference to No. 95 of 1980, case entitled Commonwealth of Pennsylvania versus Keith Zettlemoyer, R. D. 2, Selinsgrove, Pa., that on May 26, 1980, the Grand Jury of Snyder County indicted Keith Zettlemoyer on the following counts: "Count No. 1, on or about May 26, 1980, the defendant did unlawfully, knowingly and with the intent of promoting or facilitating the commission of a crime, agree with another person or persons,namely Kenneth Eugene Kipple, that they or one or more of them would engage in conduct which constitutes a crime or crimes or an attempt or solicitation to commit such crime or crimes, namely, theft, burglary, theft, robbery, kidnapping, unlawful restraint, violation of the Uniform Firearms Act and unauthorized use of a motor vehicle, and receiving stolen property, or agreed to aid such other person or persons in the commission of such crime or crimes, or of an attempt or solicitation to commit such crime or crimes, and that a

substantial step was taken with intent of fulfilling the criminal objective of saic conspiracy, a felony of the second degree, in violation of Section 903 of the Pennsylvania Crimes Code:

Count No. 2, that the defendant did on or about May 26, 1980, unlawfully and feloniously enter a building in Monroe Township, Snyder County, Pennsylvania, namely the Susquehanna Valley Mall with intent to commit a crime therein; that is to say with intent to commit theft by unlawfully taking movable property of the said Susquehanna Valley Mall and/or burglary and theft of various stores within the Susquehanna Valley Mall. Said premises were not open to the public at the time, nor was the defendant licensed or privileged to enter, in violation of Section 3502 (a) of the Pennsylvania Crimes Code, a felony of the first degree of the Crimes Code, 18 Purdon's Statutes, 3502 (a) 1;

Count No. 3, that the defendant did, on or about May 26, 1980, unlawfully and feloniously enter a separately secured portion of a building in Monroe Township, Snyder County, Pennsylvania, namely, the Radio Shack, a separately secured structure within the Susquehanna Valley Mall, with intent to commit a crime therein, that is to say, with intent to commit theft by unlawfully taking movable property of the said Radio Shack. Said premises were not open to the public at the time, nor was defendant licensed or privileged to enter, in violation of Section 3502(a)

of the Crimes Code, a felony of the first degree, of the Crimes Code;

Count No. 4, this is continued and pages two of the Grand Jury's indictment of May 26, Court No. 4, that the defendant on or about May 26, 1980, did unlawfully take or exercise unlawful control over movable property of the Radio Shack and Charles D. Fox with intent to deprive them thereof; namely, cash, a Realistic 3 Channel --

THE COURT: I don't think we need to detail it.

MR. LEWIS: All right. " -- having a value, all the property mentioned, having a value of more than two thousand dollars, which constitutes a felony of the third degree, in violation of Section 3921(a) of the Crimes Code;

Count No. 5, that the defendant did, on or about May 26, 1980, unlawfully and feloniously, in the course of committing a theft, threaten another with or intentionally put another, namely Charles D. Fox, in fear of serious bodily injury, a felony of the first degree, in violation of Section 3701(a)(ii) of the Crimes Code;

Count No. 6, that the defendant did, on or about May 26, 1980, unlawfully and feloniously remove another person a substantial distance or unalwfully confine another, namely Charles D. Fox, for a substantial period in a place of isolation, with intent to facilitate commission of a felony of flight thereafter, a felony of the first degree, in violation of

Section 2901(a) (2) of the Crimes Code:

Count No. 7, that the defendant did, on May 26, 1980, unlawfully and knowingly, restrain another, namely Charles D. Fox, in circumstances exposing him to risk of serious bodily injury, a misdemeanor of the first degree in violation of Section 2902 of the Crimes Code.--

MR. TARMAN: Your Honor, I certainly object to that.

THE COURT: Yes. We won't read misdemeanors. Any other felonies?

MR. LEWIS: Count No. 10, that the defendant did, on or about May 26, 1980, unlawfully and intentionally receive and retain property belonging to Radio Shack and Charles D. Fox, namely, cash and communication equipment, knowing that said property had been stolen or believing that it had been stolen and with no intent to restore same to owner, said property having a value in excess of two thousand dollars, a felony of the third degree, in violation of Section 3925 (a) of the Crimes Code."

This is signed by the Grand Jury Foreman on the date I previously mentioned.

THE COURT: Ladies and gentlemen, the sole purpose of reading that, we are not of course concerned as such with those charges but under the law, one of the aggravating circumstances under which the death penalty may be brought, and I will explain this more fully, one of the aggravating circumstances is that the victim was a prosecution witness to a felony

committed by the defendant was was killed for the purpose of preventing his testimony against the defendant, and that was the purpose of admitting this evidence, and the sole purpose of it.

Is there any other evidence on the part of the Commonwealth?

MR. LEWIS: No, Your Honor, not from the Commonwealth.

THE COURT: Does the defense have evidence?

MR. TARMAN: Yes, we do, Your Honor, but before we present that, I would like to contest the sufficienty of the Commonwealth's evidence.

THE COURT: Are you making a motion?

MR. TARMAN: I would like to state may reasons.

THE COURT: The Act says --

MR. TARMAN: I have specific reasons, Your Honor.

THE COURT: All right.

(Whereupon, the following occurred at side bar:)

MR. TARMAN: Your Honor, I am contesting -- I am entering a demurrer, I am contesting the sufficiency of the Commonwealth's evidence as to the aggravating circumstance under Subsection 5 for two reasons. First of all, as Mr. Lewis has already stated, the witness was never subpoenaed for trial and the Commonwealth --

THE COURT: But he was dead, they said.

MR. TARMAN: -- has not produced a subpoena and further

has stated on the record that there is no evidence in Snyder County of any subpoena being given to Mr. Devesco.

Secondly, if you read subsection 5, the subsection states that the victim was a prosecution witness to a murder or other felony committed by the defendant and my interpretation of that, from a fair reading of the subsection, means that he had to be an eye witness. It has not been alleged by the Commonwealth that Mr. Devesco was an eye witness.

THE COURT: Where do you get the eye witness? It says that the victim was a prosecution witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant.

MR. TARMAN: I interpret that to mean an eye witness or a witness who was at the scene and was killed because of this identification of the defendant. That's not in the case here, first of all.

THE COURT: Do you have any law to support that position?

MR. TARMAN: No, I do not.

THE COURT: What is your other reason?

MR. TARMAN: There is no law that I know of.

THE COURT: Any other reasons?

MR. TARMAN: No.

THE COURT: Okay. Motion denied or demurrer denied.

MR. TARMAN: Now, as to stipulations, I think we discussed this previously -- I am talking about stipulations as to

mitigating circumstances. Number one, the defendant has no significant history of prior criminal convictions. Are you willing to stipulate that he has no criminal record?

MR. LEWIS: Yes.

MR. TARMAN: Under four, the age of the defendant at the time of the crime. Are you willing to stipulate that he is twenty-five years old? I can produce evidence.

MR. LEWIS: I will stipulate.

MR. TARMAN: I will produce it anyway.

MR. LEWIS: I think you got that in through the mother.

MR. TARMAN: But the criminal record, you are willing to stipulate that he has no criminal record?

MR. LEWIS: Yes.

MR. TARMAN: Okay, and I would then request a charge also that even though -- that the jury be charged that even though he has been convicted in Snyder County, that there is no criminal record.

THE COURT: Has he been convicted?

MR. TARMAN: He has been convicted but not sentenced.

MR. LEWIS: He has not been sentenced.

THE COURT: Well, I don't know. We will wait until the evidence is in.

MR. TARMAN: He is stipulating that there is no criminal record.

MR. LEWIS: No prior criminal record.

(Whereupon, the discussion at side bar was concluded.)

MR. TARMAN: Mr. Richard Zettlemoyer, please.

RICHARD H. ZETTLEMOYER, called as a witness, being first duly sworn, according to law, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. TARMAN:

Q Mr. Zettlemoyer, your full name, please?

A Richard H. Zettlemoyer.

Q And your residence, sir?

A 2141 King Arthur's Court, Camelot Village, Harrisburg.

Q Now, Mr. Zettlemoyer, how are you employed?

A I work at Western Uniont Telegraph Company.

Q And what kind of work do you do there?

A I am District Supervisor.

Q How long have you been working with them, sir?

A Twenty-six years.

Q Mr. Zettlemoyer, you are the father of the defendant, Keith Zettlemoyer, is that correct?

A That's correct.

Q And what is Keith's age at the present time? How old is he?

A Twenty-five.

Q Now, Mr. Zettlemoyer, I would like to direct your attention to the testimony that was offered by your wife, Donna Zettlemoyer, concerning the family background and Keith's behaviour when he was a boy. Could you just first fell us how many children do you have, sir?

A Five.

Q You have Keith and four daughters, is that correct?

A That's correct.

Q Now, Keith, Mr. Zettlemoyer, your wife referred to personality problems that Keith had when he was a boy and his poor relations with the rest of the family members.

Could you add or subtract to anything that she testified to concerning that matter?

A I would have the same statements as she had. Keith did have difficulty relating to other family members.

Q Did this cause problems within your own family, sir?

A Yes, it did.

Q And did it contribute in any way to your separation, your later separation, if you could just please relate that to the jury?

A Yes. That was the main reason that my wife and I separated.

Q And do you have any personal feelings along that regard? Obviously, you are not responsible for -- directly responsible for what's happened. Do you have any feelings in your raising

of Keith, the way he was raised, in light of what's happened today and where we are at today?

A Yes, yes. I feel that I should have spent more time with him and given more of my time to him than what I did.

Q Mr. Zettlemoyer, there has been evidence brought forth during this trial concerning the mental instability of Keith and, of course, it was brought forward in our efforts to raise the defense of diminished capacity. In doing that, we traced Keith's problems from the time he was a little boy and later on into his adult life.

Do you agree basically with the testimony of your wife concerning his mental condition?

A Yes, I do.

Q Did you, Mr. Zettlemoyer, notice any change, -- first of all, did you have any contact with Keith, say, within the past year?

A Yes. He was staying with me but as I believe was testified I didn't see him very much because he went to work early and when I got home from my job, he was usually in bed.

Q Mr. Zettlemoyer, did you notice any change in Keith's behaviour, say, starting from the spring of last year?

A Yes. He was very depressed becaue of all his problems. Near the end, it got worse. Keith told me one time that he had started drinking and he never had drank before.

Q Did you see this? Did you happen to have any contact

with him in the time period within the last two weeks prior to October the 13th? Did you have any contact with him at all then?

A One or two occasions he did talk to me for about an hour or so about all the problems that he was having and how he lfet overwhelmed.

Q Could you see the stresses in Keith building up?

A Yes, I could.

Q Was Mr. Zettlemoyer, was there ever any effort or attempt, I should say, by the family to get psychiatric or psychological help for Keith? First of all, do you think it was needed?

A Yes, definitely it was needed, yes, and no, there wasn't any help and I will take most of the responsibility for that because I should have seen that.

Q Have you had occasion to visit with Keith at the Dauphin County Prison since his arrest of these charges?

A Yes, I have.

Q Has he indicated to you any remorse or any change of attitude? Just tell us what you have noticed.

A He has shown considerable remorse over the fact and he just -- at first, he couldn't actually believe that it actually happened.

Q Have there been any other changes in attitude that you have noticed, sir?

A He's taken to religion to some extent which is something he never did before.

Q Do you feel -- let me ask you this, has he ever -- Keith ever expressed any concern through your visits, has ever expressed any concern to you or the family about getting p?

A Yes, he has, several occasions.

Q Has he just merely mentioned it or has it been a dominant me in the conversations?

A He has talked to both myself and my wife about it.

Q Mr. Zettlemoyer, do you feel that Keith was suffering der extreme mental or emotional disturbance?

A Yes, I do.

Q Around the time period of October 13?

A Yes, I do.

Q And do you base this on your observations?

A On my observations and my conversations with him, yes.

Q Do you feel that his capacity to appreciate the iminality of his conduct and to conform his conduct to the quirements of law was substantially impaired?

A Yes, sir.

Q Mr. Zettlemoyer, you have been present throughout these oceedings, is that correct?

A Yes, I have.

Q And you have heard all the testimony in the trial?

A Yes.

Q And you were present throughout the testimony of your

ife, is that correct?

A Yes, I was.

Q Is there anything else that you would like to say oncerning your wife's testimony about Keith's behaviour and he problems that he had, whether they be financial or personal? irst of all, were you aware of those problems, the problems n his personal life and his financial problems?

A To some degree, not to the degree that my wife would ave been aware of them but I know he had them.

Q Were those problems made up? Were they, in fact, real roblems?

A No, they were real.

Q Now, let me direct your attention to the criminal charges that were brought against him and read into the record by ir. Lewis. Did you notice any effect on Keith after those charges were brought? Did that seem to change his behaviour?

A Well, it made him more agitated and depressed as time ent along, yes, definitely.

Q Your wife related to the fact that there was considerable publicity and when I say, considerable publicity, I mean front page publicity in the Sunbury papers. Was that correct?

A That is absolutely true.

Q Did that cause problems?

A Definitely.

Q Then is the statement valid that your names were all

in the paper concerning this?

A Yes, they were.

Q Did that have any effect on Keith?

A It made him very upset about the matter.

Q Were you aware of the relationship with Debbie; that is the young lady who was his finance and apparently left him and Keith read about it in the papers.

Were you aware of that?

A Only mildly. I wasn't that much involved in that.

Q Mr. Zettlemoyer, if your son were to receive life imprisonment in this case, would you continue to stick by him and visit him throughout?

A Yes, I would.

Q Do you think that there is any possibility, if he were to receive a sentence of life imprisonment, that he could be helped in any way?

A I feel absolutely sure that he could.

Q Do you think that he would accept that kind of help?

A Yes.

MR. TARMAN: Thank you, sir.

CROSS EXAMINATION

BY MR. LEWIS:

Q Mr. Zettlemoyer, I just have one or two very brief questions. In response to Mr. Tarman's question, you indicated

that you felt that Keith's capacity to appreciate the criminality of his conduct was somewhat impaired?

A Yes, it was.

Q As a result of what you feel are some mental problems, is that correct?

A Yes.

Q And I think Mr. Tarman also asked you whether or not you felt his capacity to conform his conduct to the requirements of law was as well impaired, is that correct?

A That is true.

Q Now, you indicated that you did have a long talk with Keith at some point in time, is that correct?

A It was approximately a week before the incident.

Q A week before this incident of the killing of Mr. Devesco, is that what you are saying?

A Correct.

Q So then that was after his arrest and indictment by the Snyder County Grand Jury on these other matters, is that correct?

A Yes.

Q Did you and Keith talk about perhaps how he chose to deal with his problems?

A No.

Q Did you and Keith discuss that perhaps it was inappropriate for him in certain circumstances, situations, to

take matters into his own hands?

A I can't say that I did that, specifically, no.

Q But did you attempt to get that point across to him?

A No. In that conversation which was one of the longest ones I had, I mostly listened and he talked.

Q Did you attempt in any way to dissuade him from pursuing any course of questionable conduct to solve his problems?

MR. TARMAN: Your Honor, I think the witness has answered the question. I think he has already stated that he listened to Keith, he did not do that.

THE COURT: All right.

MR. TARMAN: He didn't try to dissuade him.

THE COURT: Do you have any other questions?

MR. LEWIS: I have nothing further.

THE COURT: All right. That's all. Ladies and gentlemen, we are going to stop. I have another court at noon, three or four cases we just go over and by now lunch ought to be upthere or it will be shortly so we will stop for lunch. You are, of course, going to remain in the jury room. It would not be proper for you to discuss the matter before you during lunch. Wait until you have heard all the evidence. I don't know how long it is going to be. It wiol probably be last 1:00 or maybe 1:30. I don't think there is going to be a great deal of testimony. I think you will have the matter in another hour or two for your second decision so the jury will retire foı lunch, and we will

do the other cases.

(Whereupon, the jury was escorted from the courtroom at 12:07 o'clock p.m., and Court proceeded to other business, reconvening on this matter at 2:00 o'clock p.m.)

THE COURT: Is there any further testimony?

MR. TARMAN: Your Honor, aside from the witness which I mentioned, there is no further testimony.

THE COURT: All right. You may proceed to close.

(Whereupon, Mr. Tarman closed to the jury as follows:)

MR. TARMAN: Ladies and gentlemen of the jury, during the jury selection process, Mr. Lewis and I both asked you to keep an open mind if we should get to this point. I specifically asked you if you had any convictions in favor of the death penalty because I thought that was very important, and I am going to ask you now to keep an open mind.

This case should not be decided because the tax payers should not have to support a man to be in prison for life. You have heard that argument. Don't let that happen in the jury room. Do not consider that kind of evidence. It should not be decided because of the principle of an eye for an eye. We don't operate that way here. This is something that is highly controversial and feelings run high on an issue like this. We have to stick to the law.

If I did what I would like to do, reacted on emotion, I would beg, I would cry, I would do anything that I could to

save my client, anything.

I am going to try to argue some law here because that's what we have to do. I am telling you right now that if I thought it would help, if I thought it would help, I would go back to my emotions and I would do anything, but first of all, it is not proper under the law and I don't think you would accept it and I don't think you would want me to do that so I am not going to do it.

Now, the law has specified that there are certain mitigating circumstances that you can consider. If you recall, during the jury selection process I did mention that fact. Two of those mitigating factors, and His Honor, Judge Dowling, is going to tell you that we have to prove those to you by a preponderance of the evidence. The Commonwealth, on the other hand has to prove any aggravating circumstances beyond a reasonable doubt. Now, two of those deal with the mental capacities of the defendant: extreme mental or emotional disturbance or the capacity of the defendant to appreciate the criminality of his conduct.

Now, I am going to say right now that I disagree with your verdict. I do. It is against the defense that we have prepared, but I do respect it. It was your verdict. You decided this case and, as an attorney, as a defense, attorney, I am part of the system. I work within it. I am just as much a part of the system as you are and I have to take the good with the bad.

Now, if you did not believe the defense of diminished capacity then I certainly hope that at least you would consider it in regards to life or death. The District Attorney has agreed to incorporate all that testimony that we presented to you at trial and I want you to consider it. One of the other factors that you should consider is the age of the defendant. Now he is twenty-five years old, but I would ask you really how mature was he. He was a pretty young twenty-five. This man really had not grown up.

The purpose of the law and this mitigating factor is to try to give a person who is young, who is immature, who has not developed in life, and I certainly think we have proved that by a preponderance of the evidence, in the hopes that he might change, even ~~if it is~~ a sentence of life imprisonment, there is still hope for this man. There is still some hope. What is the quality of life? There is quality to every life even if it is a life in prison.

Now, think about that because that's a very important concept and it is also recognized by this Act.

Another mitigating circumstance is that the defendant has no significant history of prior criminal conduct. Now, Mr. Lewis read off to you some charges about Snyder County, but he is stipulating to the fact that the defendant has no criminal record. He is agreeing to that and that's been put on the record here before the Judge, so that is absolute proof of another

mitigating circumstance.

So we have the age and the immaturity of the defendant and I have given you the reason for that, the fact that he has no criminal record, that tells you that this man is not a hardened criminal. Yes, he was involved in some charges in Snyder County and because of his sickness, because of his complete lack of judgment, if you recall, I said to you in my closing, in March what the circumstances up there could have been, it is completely minor, infinitesimal compared to what we are talking about today, but the fact that the defendant has no criminal record, again it is recognized in the law - we are talking about law now - and I want you to consider it.

Finally, ladies and gentlemen, there is this issue that we are allwed to argue on the defendant's character. If you remember, there was some Commonwealth witnesses that came down here and said that he did a good job at his work as a window washer. Some of the people from the Mall said that he did work, he was a maintenance man. They were brought in here for other purposes but they gave you a little bit of an indication that he did not spend his life on welfare, he was able to hold down a job.

Now, it is admitted that I tried to indicate to you that his life was just about a failure in practically every aspect of it. It was a failure, of course. Again, that goes back to his mental sickness which, as I said before, if we didn't

convince you of that on the defense, we certainly want you to consider that, but there are some redeeming qualities in the man. He was able to work and apparently the people that worked with him thought something of him.

Now, even more important than that, I want you to consider his character in relationship to what his father said. His father said that he has seen him at the Dauphin County Prison. Of course, they have indicated that they are going to stick by him, they said that they would not desert him if he were to receive life imprisonment or even if it has to come to the death penalty.

Now, his father said that he shows remorse, that he has taken some solace in religion. I don't mean to overplay that. Certainly, in my experience, I can tell you that people at the prison do turn to religion but, why not? Sometimes it is done to pretend but if there is anything good to come out of this, maybe he is sincere about that, if anything possibly good could come out of this at all.

Now, the Commonwealth has to prove this aggravating circumstance that they are alleging beyond a reasonable doubt. They did prove that there was a motive but now, you think about that and I would again argue to you, and I don't mean to retry the case, but I would argume to you that if that was his motive, it was generated by his sickness. Chuck Devesco was on that list and the Clerk of Courts came down and read it off. If you notice there were other people on that list,too. Yes, they did

bring in evidence of that, but there is some question as to whether it was beyond a reasonable doubt. We heard that Mr. Devesco and Keith knew each other, they were friends. I would submit to you that there is some question as to why Keith killed him. They did bring in that motive but there is some issue to that, and I think you ought to think about that, even if you believe beyond a reasonable doubt that that had something to do with it.

Think again, and I am going to ask you to think again, don't you think the man's sickness had something to do with that? Again in my closing remarks I was talking about all this armament, the forty-one bullets and bullets falling off him on the ground as he was being arrested, falling off of his body onto the ground. Again, I would submit to you that that is absolute evidence, that evidence does not lie, it was not subject to pretending or anything else like that, the man had crossed the line from sanity into some other ground, he had completely lost judgment, he was out of control and if that was the motive, again, I would submit to you that it was a motive of a sick mind and, after all, that was the thrust of the defense. We never tried to deny that the Commonwealth proved premeditation. They had a lot of evidence of premeditation, a lot of it, and that's the hardest thing to really grasp in this case. You look at all that and you say, well, that's premeditation because they put evidence in of planning things, things like that. I told you, I don't

care if he would have written books on about how he was going to do the crime. As he was doing that, as he was planning, he was a sick person.

Now, there have been a lot of cases recently. We are trying this case, not other ones, but think about it. Think about the man that shot President Reagan. He was able to get himself in a position where he was only a few feet away from the President, with Secret Service men around and everybody else and able to get five shots off. That's evidence of planning. President Reagan came on the T.V. the other night just during this wekk and said, that was a very disturbed man. He hopes he gets better.

Look at the guy down in Atlanta. They have got half the F.B.I. down there after him. They can't catch him. That is a sick mind, but apparently very planned, very premeditated.

Now, ladies and gentlemen of the jury, this is a human decision. You can't put it into a computer. I want you to consider these mitigating circumstances, and there are five of them, as I name them off, and you hear the Judge when he tells you and again, I am going to ask you to try to be fair and to stick to the law in your decision.

Thank you.

(Whereupon, Mr. Lewis closed to the jury as follows:)

MR. LEWIS: Ladies and gentlemen, I think it would be unfair for the Commonwealth to ask you, the jury, to act as

an avenging angel and point a finger at that man and sentence him to death. I think that would be very unfair. I would not rest comfortable in making that request and I would not rest comfortable with your decision to act in that capacity because that type of attitude and that type of response, I submit to you, is based on the emotional assessment of this case.

No matter what your decision is, no matter what you decide, there is no way in the world that Charles Devesco will ever return. That is over with, so no amount of sympathy, no amount of emotion, we submit to you, should ever, ever enter into your decision at this point in the trial. We ask that again at this stage, a very crucial stage, we ask that no emotion or sympathy or compassion, bias or ill-feeling towards Keith Zettlemoyer enter into this case. We simply submit to you it is not appropriate.

Make no mistake about it, the Commonwealth is seeking and is asking you to impose a penalty of death on this defendant, but we are asking you to impose that penalty because of the circumstances we are here dealing with. This was a murder of an individual, sure, granted, this was a murder with premeditation, a murder in the first degree. That, in and of itself, does not justify the death penalty. Our law simply indicates that there are certain categories, a certain series of crimes or types of crimes where the death penalty is justified, where a jury can legitimately and properly and legally impose such a sentence.

Examples of those which are not appropriate to this case, in the first instance, the killing of a policeman or a contract killing or someone who is perhaps hired to do a killing or a killing in torture, something like that, killing during a hijack, they are examples that the Pennsylvania legislature has provided for where the death penalty is justified. Not every killing justifies the death penalty.

In addition to those I just gave you, some of those examples and there are only about five or six or them, one is the killing of a witness in a felony prosecution or a murder or felony case. So, ladies and gentlemen, the Commonwealth submits to you it is asking for your vote to impose the death penalty, not solely because of the death of Charles Devesco but above that, and in addition to that, that's certainly a great part of it, was the fact that this killing was an attack on the system. We have a system of justice. These are turbulent times we are going through as far as the condition of our society with respect to law and order and we have to maintain a system. Is it a perfect system? I do not have to tell you it isn't. Is it a good system? I submit to you it is and this attack, the killing of a prosecution witness, is an attack upon the system.

What more terrible thing can there be to solve a criminal dilemma that someone is facing by simply eradicating, getting rid of a witness. It is a frightening, it is a chilling thing because the Commonwealth is under an obligation to present these

cases to juries in a courtroom and to prosecute crimes and the police have to go out and investigate and crimes can not be solved without the witnesses, and if witnesses can be simply killed, well, then who is ever going to come forward and testify about crimes that they happen to see. It simply destroys the system, our system of justice, so the Commonwealth is asking for the death penalty solely and exclusively as the law indicates it may, based on the circumstances of this case, that it involved a premeditated, intentional killing of a witness to a serious crime, an felony.

In our system, ladies and gentlemen, punishment is provided in the law and is usually administered by the Courts. This is the only example where a jury or a jury in Pennsylvania can come in and participate in the sentencing aspect of a case. This does not happen in any other crime except murder of the first degree and only under special circumstances which Judge Dowling has already referred to as aggravating circumstances, one of which is the killing of a prosecution witness. The aggravating circumstance is something that makes the crime even more serious than it already is, but ladies and gentlemen, you are now participating in the penalty stage of the crime.

You have to consider, number one, the appropriate punishment and number two, you have to consider what, if any, deterrent effect your decision should have --

MR. TARMAN: Your Honor, I would object to the

deterrent effect. I think the District Attorney should be only allowed to argue the law, that the law is specific that only those aggravating circumstances in the law can be considered. The deterrent effect of the death penalty has no place in their deliberations.

THE COURT: Overruled. Proceed.

MR. LEWIS: You, as the jury, have a right to consider upholding the system. You, as the jury, have a right to consider what effect your decision as to the penalty we impose on Mr. Zettlemoyer, what place the deterrent effect should play in that decision and I submit to you it is a very important one and it is a very crucial one.

The Commonwealth simply asks for a just decision in this case. We ask for a just decision based on everything you have heard during the trial. Incorporate all this testimony in your deliberations. You heard it, you were right here in the room, you heard everything. We submit to you that the death penalty in this case is justified because of the nature of the crime, because of its attack upon our system of justice and we ask you to consider all those factors.

Thank you very much for your attention.

THE COURT: Ladies and gentlemen, you must now decide what sentence is to be imposed upon the defendant, whether it be death or life imprisonment. In a very proper sence, you are not really making that decision. You are not deciding whether

he should be sentenced to death or life imprisonment. That was the law years ago and the Supreme Court of the United States declared such death penalties to be unconstitutional. I won't go into the reason. One of the theories was that it placed discretion on the jury. They could decide whether a particular individual could suffer death or life imprisonment. They have removed that burden from you. That is not what you are to decide. You are to decide whether there are certain aggravating circumstances or mitigating circumstances and depending upon how you find those circumstances,as I will explain to you, your decision follows. It must follow. If you find a certain way, a certain penalty must follow. That is the law. If, for example, as I will explain in a little more detail, you find unanimously beyond a reasonable doubt, that there is an aggravating circumstance and no mitigating circumstances or that the aggravating circumstance outweighs the mitigating circumstances, you must return a verdict of death. So the burden is not really yours. That is the law that you took an oath to uphold. If you do not, on the other hand, if you find that the mitigating circumstances outweigh the aggravating circumstances, or that there is no aggravating circumstances, then you must return a verdict of life imprisonment.

So you see, it is not really your decision in a sense. You decide, of course, the underlying factors but it is the way you decide those factors that the penalty is imposed. That

is the way the Supreme Court and our legislature have felt that they would remove that burden or that discretion from the jury.

It is up to you, of course, to find these mitigating or aggravating circumstances and to accord them whatever weight they should be give. Once you find a certain way, as I have just explained, the penalty follows.

The Crimes Code or the law provides for ten aggravating circumstances. Only one is applicable to this case. There are ten of them. I am not going to read the ten because they have nothing to do with this case, except one: that is, aggravating circumstances shall be limited to the following: number five, the victim, that would be Mr. Devesco, was a prosecution witness to a murder or other felony and it has been stipulated what the crimes were and they are felonies, most of them, committed by the defendant, and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceedings involving such offense.

The Commonwealth contends that that is the aggravating circumstance. You must be satisfied beyond a reasonable doubt, and I have explained to you that means the type of doubt that would cause a reasonably careful person to hesitate in acting in a matter of importance. It does not mean beyond all doubt. It is not something that you conjure up to avoid an unpleasant duty. It has to arise out of the evidence or lack of evidence but you must be satisfied beyond a reasonable doubt that there

is an aggravating circumstance.

That is not the end of it, of course. If you find that there is an aggravating circumstances beyond a reasonable doubt, then you consider whether or not there are mitigating circumstances to detract from this. There the burden is upon the defense. However, the burden is only the preponderance of the evidence. It is not as great a burden. It simply means the evidence in favor of the mitigating circumstances must outweigh every so slightly the evidence against it.

There are in the law -- well, there's an unlimited number. They list eight. They list seven and they say, any other evidence of mitigation concerning the character. Four of them may be applicable to this case, the others are not. They are one, that the defendant has no significant history of prior criminal convictions; two, he was under the influence of extreme mental or emotional distress;the third one, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired; four, the age of the defendant at the time of the crime and then this eighth one; any other evidence of mitigation, which would be the fifth one to consider, any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.

All of the evidence from both sides that you have heard earlier, of course, during the trial in chief, all of that which

has any bearing in your judgment upon aggravating or mitigating circumstances as I have mentioned them is important or proper for you to consider.

As I previously told you, as requested by counsel, it is entirely up to the defendant whether to testify and that would include, of course, the trial and this proceedings, too, and you must not draw any adverse inference from his silence.

The verdict, of course, must be unanimous. Again, if you find unanimously, beyond a reasonable doubt, the aggravating circumstance that I have mentioned, the only one that's applicable, that the victim was a prosecution witness to a felony and it was committed and he was murdered so that he would not testify, that is an aggravating circumstance. If you find that aggravating circumstance and find no mitigating circumstances or if you find that the aggravating circumstance which I mentioned to you outweighs any mitigating circumstance you find, your verdict must be the death penalty. If, on the other hand, you find that the Commonwealth has not proven an aggravating circumstance beyond a reasonable doubt or if they have, that the mitigating circumstances outweight the aggravating circumstances, then you must bring in a verdict of life imprisonment.

Anything further?

MR. TARMAN: I have some exceptions to the record, Your Honor.

THE COURT: I might say while they are coming up that

the verdict slip, the law does not say whether the same person would be the foreman. I don't know that that makes any difference. I suppose you could select a new foreman or forelady. The foreman or forelady is merely someone who has to bring in the verdict. The verdict slip, I have death or life imprisonment; you check whatever it is. If you sentence him to death, then you have to give us the reason. There's two possibilities; you check which one. One aggravating circumstance and no mitigating; then you must list the aggravating circumstance, the killing of a witness to a felony, or you may check, aggravating circumstance outweighs the mitigating circumstance. Again, you indicate what the aggravating circumstance is and in this case, there is only one aggravating circumstance in issue.

All right. Now, what is it?

(Whereupon, the following occurred at side bar:)

MR. TARMAN: First of all, towards the end of your charge, you indicated that the mitigating circumstances have to outweigh the aggravating circumstances in order to find life; in other words, you said if you find an aggravating circumstance, you have to then find that the mitigating circumstances outweigh it. That's not the law. The law doesn't say that.

THE COURT: It says the aggravating outweighs the mitigating doesn't it?

MR. TARMAN: Only if they find -- here is what I wanted you to do. Your statement on the law was, if you find that there

an aggravating circumstance, you must find that the mitigating circumstances outweigh that in order to find life. That's what I am objecting to.

THE COURT: Isn't that what the law is? What is it?

MR. TARMAN: It says, or if the jury unanimously finds one or more aggravating circumstances which outweight any mitigating circumstances, that's under subsection four.

MR. LEWIS: It's silent on the part you mention.

MR. TARMAN: You are creating a different burden. You are saying the mitigating has to outweight the aggravating. To my thinking, if it was fifty-fifty, they have to come back with life. The law says the aggravating has to outweight the mitigating. It never says the mitigating has to outweight the aggravating.

THE COURT: I will repeat it.

MR. TARMAN: I think it is very important. I don't think it was made clear that the mitigating only have to be proven by the preponderance of the evidence.

MR. LEWIS: That was stated.

THE COURT: And I explained what preponderance was. I will do it again.

MR. TARMAN: I would like you to indicate, I mentioned it in my remarks, I would like you to charge the jury upon the fact that the District Attorney has stipulated to the first mitigating circumstance.

MR. LEWIS: We have only stipulated there was no prior

cord, not that there is no criminal record.

MR. TARMAN: He has no criminal record. Aren't you ipulating to the mitigating circumstances?

MR. LEWIS: We are saying there is no prior record.

MR. TARMAN: The defendant has no significant history prior criminal convictions. Aren't you stipulating to that saying he has no record?

MR. LEWIS: We are indicating that he has no significant story of prior criminal convictions.

MR. TARMAN: That's a stipulation.

THE COURT: I will try again.

(Whereupon, the discussion at side bar was concluded.)

THE COURT: I will try to summarize it, ladies and ntlemen. I don't want to get anybody mixed up on a matter semantics. Under the law, as I said, you are obligated by ur oath of office to fix the penalty at death if you animously agree and find beyond a reasonable doubt that there an aggravating circumstances and either no mitigating rcumstance or that the aggravating circumstance outweighs any tigating circumstances. Now, there has been evidence from ich you could find mitigating circumstances. In fact, the e mitigating circumstance is agreed to, that he has no gnificant history of prior criminal convictions, but what you ve to decide is whether the aggravating circumstance, if you nd such, outweighs any mitigating and if it does, then your

penalty must be death.

(Whereupon, the following occurred at side bar:)

MR. TARMAN: I am requesting that they specifically be told that the mitigating does not have to outweigh the aggravatin They were already told the previous.

THE COURT: You have an exception.

MR. TARMAN: May I put on one other statement? I would take a general exception to the charge in that I don't think they should have to have it explained to them about the prior law on the death penalty, the fact that that burden has been taken from them.

THE COURT: All right.

(Whereupon, the discussion at side bar was concluded.)

THE COURT: Ladies and gentlemen, you will retire now and consider your verdict.

(Whereupon, the jury was escorted from the courtroom and Court was recessed at 2:34 o'clock p.m., and reconvened at 5:25 o'clock p.m.)

THE COURT: Ladies and gentlemen of the jury, have you agreed upon a verdict?

THE FOREMAN: We have, Your Honor.

THE COURT: Would you hand the verdict slip to the clerk, please? There will be no reaction in the courtroom to the verdict. I want no reaction.

THE CLERK: Will the foreman of the jury please rise?

In the case of the Commonwealth versus Keith Zettlemoyer, docketed to No. 1818 Criminal Division 1930, what is your verdict?

THE FOREMAN: We, the jury, unanimously sentence the defendant to death.

THE COURT: You may record the verdict.

MR. TARMAN: Your Honor, I request a poll and I would like that to include the findings of the jury.

THE COURT: The finding is the death penalty. I am not sure what you mean.

MR. TARMAN: May I see the verdict?

THE COURT: Certainly, come up.

(Whereupon, the following occurred at side bar:)

THE COURT: Let me do the poll.

MR. TARMAN: I would like the poll of the jury to include what the mitigating circumstances were that the jury found in favor of the defendant. The jury has stated apparently from their verdict that the aggravating circumstance outweighs the mitigating circumstances. I would like the jury to be able to state which mitigating circumstances it outweighs.

THE COURT: Well, the request is refused.

(Whereupon, the discussion at side bar was concluded.)

THE COURT: Ladies and gentlemen, I believe -- I am sure we did poll the jury at the time of the initial verdict and again, this means that each juror is to indicate what his or her verdict is and the verdict is either death or life

imprisonment.

In the case of Commonwealth versus Keith Zettlemoyer to No. 1818, charge of murder, having found the defendant guilty of murder in the first degree, juror number one, what is your verdict with respect to the sentence?

JUROR NO. 1: Death.

THE COURT: Juror number two, what is your verdict?

JUROR NO. 2: Death.

THE COURT: Juror number three?

JUROR NO. 3: Death.

THE COURT: Juror number four?

JUROR NO. 4: Death.

THE COURT: Juror number five, what is your verdict?

JUROR NO. 5: Death.

THE COURT: Juror number six, what is your verdict?

JUROR NO. 6: Death.

THE COURT: Juror number seven, your verdict?

JUROR NO. 7: Death.

THE COURT: Juror number eight, what is your verdict?

JUROR NO. 8: Death.

THE COURT: Juror number nine, what is your verdict?

JUROR NO. 9: Death.

THE COURT: Juror number ten, what is your verdict?

JUROR NO. 10: Death.

THE COURT: Juror number eleven, what is your verdict?

JUROR NO. 11: Death.

THE COURT: Juror number twelve, what is your verdict?

JUROR NO. 12: Death.

THE COURT: You may record the verdict.

(Whereupon, the verdict was recorded at5:34 o'clock p.m.)

THE CLERK: Ladies and gentlemen of the jury, will you please all rise? Harken to your verdict as the Court hath it recorded. You say that in the case of the Commonwealth versus Keith Zettlemoyer, docketed to No. 1818 Criminal Division 1980, you find the imposition of death and so say you all.

THE JURY: (Affirmative response.)

THE COURT: You may be seated. Bring the defendant to the bar. Under the statutes, it indicates that when a jury agrees upon a verdict the Court shall impose the sentence fixed by the jury. I therefore sentence you to death, the date of execution can not be fixed at this time because it obviously depends upon such post trial motions and appeals as will be filed. The law provides that the review of the death penalty is mandatory by the Supreme Court of Pennsylvania. In addition to that, the defendant has the right to file post trial motions, motion for new trial, motion in arrest of judgment within ten days. You have been represented heretofore by a Public Defender who, I am sure, will continue to represent you and file all the necessary legal matters so there is nothing for me to do with respect to

the defendant at this time. There is no bail and there will be no bail.

You may remove the defendant.

MR. TARMAN: Your Honor, we would request an extension on the ten days in order for a transcript before we file our post trial motions. I would state for the record we will be filing post trial motions.

THE COURT: I am sure of that. May I suggest the usual form is, you just simply file a motion and then you can supplement that later. See me. We will have no difficulty with that. That is the usual procedure, to file a motion and supplement it.

Remove the defendant, please.

Ladies and gentlemen, I don't know that it is the proper word to use, thanks. You really shouldn't thank somebody for something as difficult and unplasant but you have done your duty. In our system of government, jurors have to make this determination. It has to be done. We don't like to do these things. I am sure you had a great deal of problem with having to perform your duty. I think that under the circumstances your decision is totally justified.

You may now of course discuss the case. You don't have to discuss it with anyone. You are under no obligation to say anything to anybody. You are at liberty to do so.

I thank you on behalf of the community and the Court for your servies as jurors. As I say, under our system of

government, this is the way it has to be done and it fell your lot and I am sure that all of you would have not been anxious for this type of thing but it has to be done and it's been done and you have the thanks of the Court and the community.

Now, you are dismissed. You are excused.

(Whereupon, the proceedings were concluded at 5:35 o'clock p.m.)

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END OF DOCKET